TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

No. 225.

THE AMERICAN SUGAR REFINING COMPANY, PETITIONER,

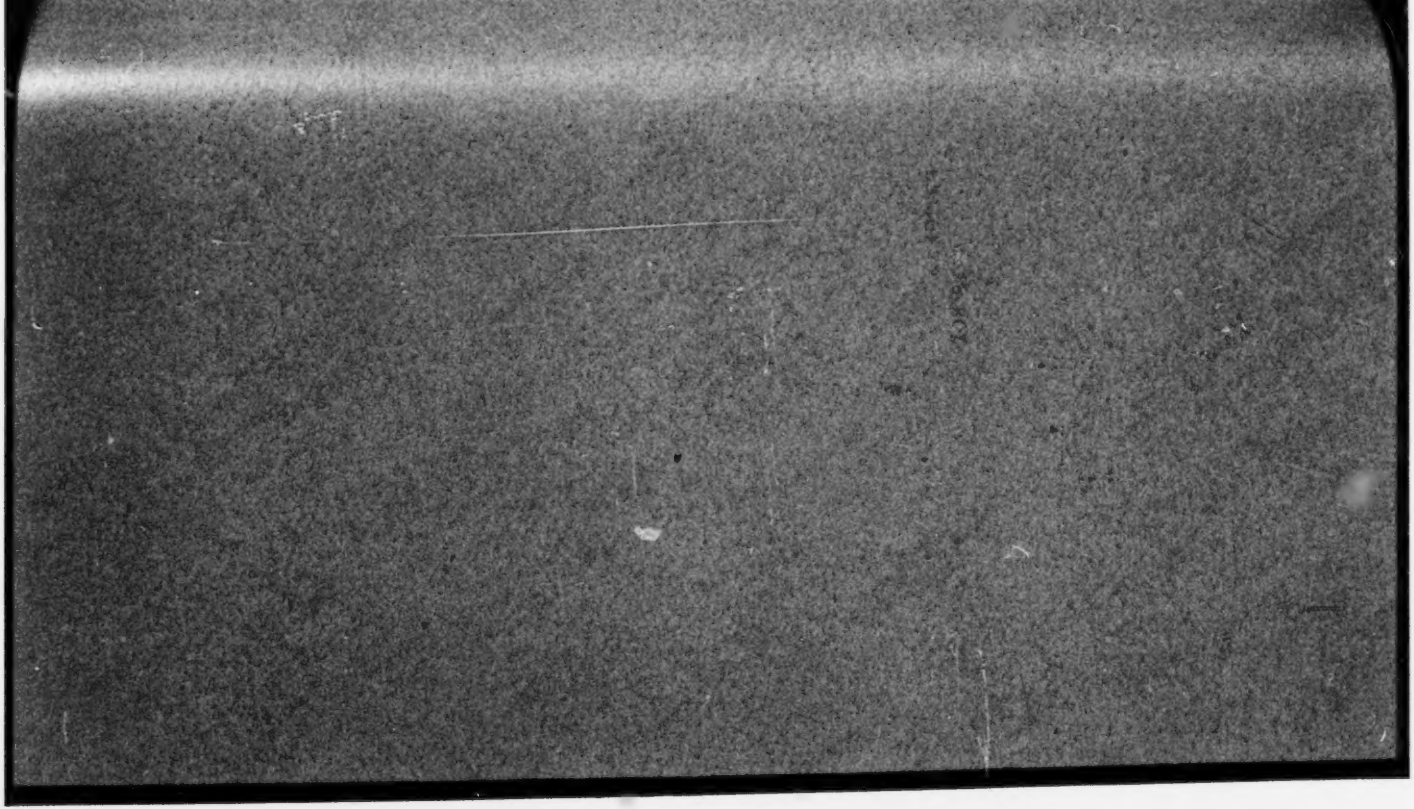
vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 17, 1900.
CERTIORARI AND RETURN FILED AUGUST 6, 1900.

(17,678.)



(17,673.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

No. 225.

THE AMERICAN SUGAR REFINING COMPANY, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the circuit court of the United States for the southern district of New York	*a*	1
Petition of importers	1	1
Bond for damages and costs	7	4
Order upon the board of United States general appraisers	9	5
Return of the board of United States general appraisers	10	6
Exhibit A—Letter, deputy collector to board of United States general appraisers submitting protest	11	6
C—Protest	12	7
B—Letter, deputy collector to board of United States general appraisers submitting protest	14	8
D—Protest	15	8
E—Protest	16	9
F—Decision of board of United States general appraisers.	18	10
G—Decision of board of United States general appraisers.	19	10

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 11, 1900.

	Original.	Print
Supplemental return	21	11
Stipulation and order to correct petition	23	12
Application for reference	25	13
Order of reference to George H. Sharpe	26	13
Order extending time to take testimony	27	14
Testimony taken before George H. Sharpe, referee	29	15
Testimony of William C. Jacobs	31	16
Opinion, Townsend, J	37	20
Judgment of affirmance	40	22
Assignment of errors	41	23
Joinder in error	44	24
Bond	45	24
Notice of appeal	48	26
Petition of appeal	49	27
Citation	50	27
Clerk's certificate	51	28
Opinion, Shipman, J	52	28
Judgment	57	31
Clerk's certificate	59	32
Writ of certiorari	60	32
Stipulation as to return to writ of certiorari	63	33
Return to writ of certiorari	65	33

a United States Circuit Court of Appeals for the Second Circuit.

THE AMERICAN SUGAR REFINING COMPANY, Appellant,
vs.
THE UNITED STATES, Appellee. } (2676.)

Transcript of Record.

Appeal from circuit court of the United States for the southern district of New York.

1 United States Circuit Court for the Southern District of New York.

In the Matter of the Application of THE AMERICAN SUGAR REFINING COMPANY for a Review of the Decision of the Board of General Appraisers as to the Rate and Amount of Duty on Certain Merchandise Imported by the American Sugar Refining Company, a Corporation, Incorporated under the Laws of the State of New Jersey, per Jno. Swan, March 15, 1897; per Richmond, March 11, 1897; per Bellauri, March 30, 1897. Protest Nos. 23975 F—6504; 24041 F—7211; 24042 F—7212.

To the honorable the circuit court of the United States for the southern district of New York:

Your petitioner is a corporation duly organized and existing under the laws of the State of New Jersey, and engaged in business as such corporation at the port of New York. Your petitioner is dissatisfied with the decision made on the 18th day of November, 1897, by the board of general appraisers designated by the
2 Secretary of the Treasury for and on duty at said port, pursuant to the act of Congress approved June 10, 1890, entitled "An act to simplify the laws in relation to the collection of the revenues," as to the construction of the law and of the facts respecting the classification of certain merchandise, to wit, on certain sugar, per entries numbered 41123, 39405 and 51209, imported per John Swan, March 15, 1897; per Richmond, March 11, 1897; per Bellauri, March 30, 1897, and as to the rate of duty imposed thereon under such classification, such merchandise having been entered for consumption by your petitioner, respectively makes application to this court for a review of the questions of law and fact involved in such decision, and hereby makes the following concise statement of the errors of law and fact complained of, to wit:

The said merchandise was classified and assessed for duty at 40 per cent. ad valorem under Schedule E of the tariff act of August 28, 1894, and upon the value thereof, and reported to the collector as the value of said sugar in condition as landed in the United States, and not upon the value thereof in the principal markets of the country whence the same was imported at the time of shipment and in condition as shipped, which is the dutiable value thereof as

prescribed by law, although such dutiable value was reported by the appraiser as part of his return of appraisement, and the entries thereof were liquidated accordingly.

The said owner and importer being dissatisfied with the decision assessing duty as aforesaid, gave notice within ten days after said liquidation and ascertainment of duty, setting forth the reasons of its objection thereto, claiming the said merchandise to be dutiable at forty per cent. ad valorem upon the actual market value and wholesale price thereof in the principal markets of the country whence the same was imported, at the time of shipment and in condition as shipped. Whereupon the invoices and all papers
3 and exhibits connected therewith were duly transmitted to the said board of general appraisers, which board proceeding to hear and determine the questions of law and fact involved, reversed the collector's said decision in the premises. The record of their decision to this effect appears in communications addressed to the collector of the port under date of the 18th of November, 1897, copies of which are hereto attached and made part hereof.

And for the errors of law and fact in the decision of said board in this regard herein complained of your petitioner states:

1. That the said board were in error in holding—

I. That duty on said importation was assessed upon the appraised value thereof.

2. In not holding that duty should have been assessed upon the actual market value and wholesale price of the merchandise in the principal markets of the country whence the same was shipped at the time of shipment, and in condition as shipped, as reported by the appraiser, and that such value so reported is the lawful and actual appraised and dutiable value of such merchandise.

3. In not holding that the action of the collector in assessing duty upon the increased value of said sugar reported by the appraiser as due to drainage on the voyage of importation, the same being the value thereof at the time of landing and in the condition thereof as landed, was illegal and not the dutiable value of such merchandise.

4. In not holding that any advance in the value of said sugar occurring subsequent to the date of the shipment thereof from the place whence imported, did not constitute an element of dutiable value.

4 Accordingly your petitioner respectfully prays this court to order the said board of general appraisers to return to the court the record and evidence taken by the said board, together with a certified statement of the facts involved in the case, and of their decision thereon, and thereupon to proceed to review said decision, and to determine the questions of law and fact involved in the same.

THE AMERICAN SUGAR REFINING CO., *Petitioner.*

JOHN E. PARSONS,
Attorney for Petitioner, 111 *Broadway, New York City.*

General appraiser.
Dictated.

Typewritten H.
Compared R.

Value of sugar.
Not for publication.

In the Matter of the Protests 23975 F/6504 of THE AMERICAN SUGAR REFINING CO. against the Decision of the Collector of Customs at New York as to the Rate and Amount of Duties Chargeable on Certain Merchandise Imported per Jno. Swan. Entered March 15, 1897.

Before the U. S. general appraisers at New York, Nov. 18, 1897.

Opinion by Wilkinson, G. A.

The appellants appeared and submitted the case on the record.

5 We find, upon the collector's report, that duty was assessed upon the appraised value.

The protest is overruled.

H. M. SOMERVILLE,
GEO. TICHENER,
CHARLES H. HAM,
Board of U. S. General Appraisers.

Three inclosures.

Entry and invoices returned herewith. Protests received with the collector's letter of September 7, 1897.

General appraisers.
Dictated.

Typewritten by H.
Compared by R.

Value of sugar.
Not for publication.

In the Matter of the Protests $\frac{24041}{7211}$ $\frac{24042}{7212}$ F of THE AMERICAN SUGAR REFINING COMPANY against the Decision of the Collector of Customs at New York — to the Rate and Amount of Duties Chargeable on Certain Merchandise Imported per Richmond, Entered M'ch 11, '97; per Bellaura, Entered M'ch 30, '97.

Before the U. S. general appraisers at New York, Nov. 18, '97.

Opinion by Wilkinson, G. A.

The appellants appeared and submitted the case on the record.

6 It appears that the appraisers made certain additions to market value and no application for reappraisement was made.

We find upon the report of the collector that duty was assessed

upon the value of the merchandise as returned by the U. S. appraisers.

The protest is overruled.

H. M. SOMERVILLE,
GEO. TICHENOR,
CHARLES H. HAM,
Board of U. S. General Appraisers.

Five enclosures.

Entries and invoices returned herewith. Protests received with the collector's letter of Sept. 8, '97.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the application of the American Sugar Refining Company for a review of the decision of the board of general appraisers, &c. Petition. John E. Parsons, attorney for petitioner, 111 Broadway, New York city. U. S. circuit court. Filed Dec. 17, 1897. John A. Shields, clerk.

7 United States Circuit Court for the Southern District of New York.

In the Matter of the Application of THE AMERICAN SUGAR REFINING COMPANY for a Review of the Decision of the Board of General Appraisers as to the Rate and Amount of Duty on Certain Merchandise Imported by the American Sugar Refining Company, a corporation incorporated under the laws of the State of New Jersey, per Jno. Swan, March 15, 1897; per Richmond, March 11, 1897; per Bellauri, March 30, 1897. Protest, Nos. 23975 F—6504, 24041 F—7211, 24042 F—7212.

Know all men by these presents that I, Francis O. Matthieson, of the city of New York, am held and firmly bound unto the United States of America in the sum of one hundred dollars to be paid to the said United States of America, for the payment of which well and truly to be made I bind myself and my heirs, executors and administrators.

Sealed with my seal and dated the 16th day of December, 1897.

Whereas, the above-named American Sugar Refining Company has applied or will apply to the circuit court of the United States for the southern district of New York for a review of the ques-
8 tions of law and fact involved in the decision of the board of United States general appraisers at the port of New York, upon the entry of certain merchandise as above mentioned.

Now, therefore, the condition of this obligation is such, that if the above-named applicant shall prosecute said matter, application or proceeding to effect, and pay all damages and costs, if he shall fail to make said matter, application or proceedings good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

F. O. MATTHIESON. [SEAL.]

Sealed and delivered and taken and acknowledged before me this 16th day of December, 1897.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

On December 16, 1897, before me personally appeared Francis O. Matthiesen, to me known to be the individual who executed the above bond, who, being duly sworn, deposes and says: That he is a resident of the southern district of New York, and that he is worth the sum of two hundred dollars over and above all his just debts and liabilities; and duly acknowledged that he executed the same.

[SEAL.] JOHN H. HAMMOND,
Notary Public, New York County.

Approved Dec. 17, 1897.

——— ———,
U. S. Circuit Judge.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the application of the American Sugar Refining Company for a review of the decision of the board of general appraisers, &c. Bond for damages and costs. John E. Parsons,
9 attorney for petitioner, 111 Broadway, New York city. This bond is approved as to form and amount and sufficiency of surety. Dated December —, 1897. E. Henry Lacombe, U. S. circuit judge. U. S. circuit court. Filed Dec. 14, 1897. John A. Shields, clerk.

At a stated term of the circuit court of the United States for the southern district of New York, held at the United States court-house and post-office building in the city of New York, on the 17th day of December, 1897.

Present: Hon. E. Henry Lacombe, judge.

In the Matter of the Application of THE AMERICAN SUGAR REFINING COMPANY for a Review of the Decision of the Board of General Appraisers as to the Rate and Amount of Duty on Certain Merchandise Imported by the American Sugar Refining Company, a Corporation Incorporated under the Laws of the State of New Jersey, per Jno. Swan, March 15, 1897; Richmond, March 11, 1897; Bellauri, March 30, 1897. Protest- Nos. 23975 F—6504, 24041 F—7211, 24042 F—7212.

On reading and filing the petition herein and the exhibits thereto annexed, and on motion of John E. Parsons, attorney for the petitioner, it is—
10 Ordered, that the board of United States general appraisers at the port of New York return to this court the record and evidence taken by them in each of the above matters, together with a certified statement of the facts involved in such matters and their decision thereon.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the application of the American Sugar Refining

Company for a review of the decision of the board of general appraisers, &c. Order to the board of general appraisers. John E. Parsons, attorney for petitioner, 111 Broadway, New York city. U. S. circuit court. Filed Dec. 17, 1897. John A. Shields, clerk.

In the Circuit Court of the United States for the Southern District of New York.

In the Matter of the Application of THE AMERICAN SUGAR REFINING COMPANY for a Review of the Decision of the Board of United States General Appraisers as to the Rate, &c., of Duty on Certain Sugar Imported by Them in the Vessels and on the Dates Named Herein. Suit No. 2676.

Return of the Board of United States General Appraisers to the Order of Hon. E. Henry Lacombe, Circuit Judge.

Dated New York, Jan. 21, 1898.

11 The board of United States general appraisers, sitting at New York, in response to the order of the court in the above matter, make the following return of the record and evidence taken by them in the above matter, and of the facts involved therein, as ascertained by them.

They state that letters, hereto annexed as Exhibits "A" and "B," were received from the collector of customs at New York, submitting, under the provisions of section 14 of the act of June 10, 1890, the protests marked Exhibits "C," "D," and "E," and described as follows:

Coll's No.	Board No.	Protestants.	Vessel.	Date of entry.
6504	23975 F.	American Sugar Refining Co.	Jno. Swan.	M'ch 15, '97
7211	24041 F.	"	Richmond.	M'ch 11, '97
7212	24042 F.	"	Bellaura.	M'ch 30, '97

On the 18th of November, 1897, the board rendered decisions upon said protests. Copies of the opinions are annexed as Exhibits "F" and "G."

EXHIBIT A.

OFFICE OF THE COLLECTOR OF CUSTOMS,
PORT OF NEW YORK, *September* 7, 1897.

Board of general appraisers, port of New York.

GENTLEMEN: I transmit the protest of the American Sugar Refining Co., No. 6504, against the assessment of duty as made by this office, on certain "sugar" based upon an alleged excessive valuation of the sugar.

The merchandise was imported by them in the "Jno. Swan" March 15, 1897.

I have to state that to the entered amount of the invoice the appraiser made certain additions to make market value. No
12 application for a reappraisement was made by the importers under the provisions of sec. 13 of the act of June 10, 1890, hence duty was assessed upon the value of the mdse. as returned by U. S. appraiser.

Respectfully yours, W. E. ESTERBROOK,
Deputy Collector.

(4 inclosures.)

(Endorsed:) 23975 F. Custom-house, collector's office, New York, N. Y., Sept. 7, 1897. G. R. Bidwell, collector. Subject: No. 6504. Am. Sugar Ref. Co. Received by board of U. S. general appraisers, Sep. 8, 1897.

EXHIBIT C.

N. Y., *Aug.* 11, 1897.

Hon. Geo. R. Bidwell, collector, port of New York.

SIR: The American Sugar Refining Company hereby protests against your decision as to the rate and amount of duty imposed upon certain sugars imported per Jno. Swan on the 13th day of March, 1897, entry No. 41123, because the amount of duty so imposed is excessive and illegal for reasons following, to wit:

1. That although the appraisers ascertained and reported to you the actual market value and wholesale price of said sugar in the principal markets of the country whence the same was imported at the time of importation and in condition as shipped, he also appraised and returned to you the value of said merchandise in condition as landed in the United States, making report to you as follows: "Value of sugar per unit of quantity advanced from 6/8 per cwt. 87°, the market value when shipped, to 7/9 per cwt. 87° in
13 condition landed, owing to increased value due to drainage on the voyage of importation."

2. That you exacted duty upon the increased value in condition landed, so reported to you notwithstanding the fact that the appraiser had reported to you a lower value of the sugar at the time of shipment and in condition as shipped, which action on your part was in violation of section 19 of the act aforesaid which requires that "the duty shall be assessed upon the market value of wholesale quantities, at the time of exportation to the United States, and in condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale," and that the words "value" or "actual market value," wherever used in said act or in any law relating to the appraisement of imported merchandise, shall be construed to mean the actual market value or wholesale price as defined in said section.

Respt. yours,
THE AMERICAN SUGAR REFINING CO.,
By HENRY C. MOTT, *Attorney.*

(Endorsed:) 6504. The American Sugar Ref. Co. Jno. Swan. 23975 F. Sugar. Vessel, c. Jno. Swan. Entry, 1897, Mar. 15. Liq'ed, 1897, Aug. 7. Protested, 1897, Aug. 11. Custom-house, New York, Aug. 11, 1897. Received.

14 EXHIBIT B.

UNITED STATES CUSTOMS SERVICE, PORT OF NEW YORK,
COLLECTOR'S OFFICE, *Sept.* 8, 1897.

Board of U. S. gen'l appraisers at the port of New York.

GENTLEMEN: I submit the protests of the "American Sugar Ref. Co." $\frac{24041\ F\ \ 24042\ F}{Nos.\ 7211-7212}$ against the assessment of duty as made by this office, on certain "sugar" based on an alleged excessive valuation of the same—

The mdse. was imported by them in the vessels named.

An inspection of the invoices shows that to the entered amount of the invoices the appraiser made certain additions to make market value. No application for a reappraisement was made by the importers under the provisions of sec. 13 of the act of June 10, '90, hence duty was assessed upon the value of the mdse. as returned by the U. S. appraiser. Note S. 17302.

I have to report that the claimants have complied with the requirements of section 14 of the act of June 10, 1890, so far as lodging protest within the statutory time.

The naval officer concurs in the decision of this office.

The entries and invoices covered by the above protest are inclosed herewith.

Respectfully yours, W. E. ESTERBROOK,
Deputy Collector.

(7 inclosures.)

(Endorsed:) 24041 F—24042 F. Port of New York, collector's office, —— —, 189-. —— ——, collector. Submitting protest of ——. Received by board of U. S. general appraisers, Sep. 9, 1897.

15 EXHIBIT D.

AUG. 19, 1897.

Hon. Geo. R. Bidwell, collector port of New York.

SIR: The American Sugar Refining Company hereby protests against your decision as to the rate and amount of duty imposed upon certain sugars imported per S. S. Richmond on the 10th day of March, 1897, entry No. 39405, because the amount of duty so imposed is excessive and illegal for reasons following, to wit:

1. That although the appraisers ascertained and reported to you the actual market value and wholesale price of said sugar in the principal markets of the country whence the same was imported at the time of importation and in condition as shipped, he also appraised and returned to you the value of said merchandise in condition as landed in the United States, making report to you as follows: "Value of sugar per unit of quantity advanced from 6/8 per

cwt. 87°, the market value when shipped, to 7/9 per cwt. 87° in condition landed, owing to increased value due to drainage on the voyage of importation."

2. That you exacted duty upon the increased value in condition landed, so reported to you notwithstanding the fact that the appraiser had reported to you a lower value of the sugar at the time of shipment and in condition as shipped, which action on your part was in violation of section 19 of the act aforesaid, which requires that "the duty shall be assessed upon the market value of wholesale quantities, at the time of exportation to the United States, and in condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale," and that the words "value" or "actual market value," wherever used in said act or in any law relating to the appraisement of imported merchandise, shall be construed to mean the actual market value or wholesale price as defined in said section.

16

Respt. yours,

THE AMERICAN SUGAR REFINING CO.,
By HENRY C. MOTT, *Attorney.*

(Endorsed:) 7211. American Sugar Ref. Co. Richmond. Sugar. Vessel, Richmond. Entry, Mar. 11, '97. Liq'ed Aug. 14, '97. Protested Aug. 20, '97. Custom-house, New York, Aug. 20, 1897. Received. 24041 F.

EXHIBIT E.

AUG. 19, 1897.

Hon. Geo. R. Bidwell, collector port of New York.

SIR: The American Sugar Refining Company hereby protests against your decision as to the rate and amount of duty imposed upon certain sugars imported per S. S Bellaura, on the 30th day of March, 1897, entry No. 51209, because the amount of duty so imposed is excessive and illegal for reasons following, to wit:

1. That although the appraisers ascertained and reported to you the actual market value and wholesale price of said sugar in the principal markets of the country whence the same was imported at the time of importation and in condition as shipped, he also appraised and returned to you the value of said merchandise in condition as landed in the United States, making report to you as follows: "Value of sugar per unit of quantity advanced from $\frac{6}{8}$ per cwt. 87°, the market value when shipped, to $\frac{7}{8}$ per cwt. 87° in condition landed, owing to increased value due to drainage on the voyage of importation."

17

2. That you exacted duty upon the increased value in condition landed, so reported to you notwithstanding the fact that the appraiser had reported to you a lower value of the sugar at the time of shipment and in condition as shipped, which action on your part was in violation of section 19, of the act aforesaid, which requires that "the duty shall be assessed upon the market value of wholesale quantities, at the time of exportation to the United States,

and in condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale," and that the words "value" or "actual market value" wherever used in said act or in any law relating to the appraisement of imported merchandise shall be construed to mean the actual market value or wholesale price as defined in said section.

Respt. yours,

THE AMERICAN SUGAR REFINING CO.,
By HENRY C. MOTT, *Attorney.*

(Endorsed:) 7212. American Sugar Ref. Co. Bellaura sugar. Vessel, Bellaura. Entry, Mar. 30, '97. Liq'ed Aug. 14, '97. Protested Aug. 20, '97. Custom-house, New York, Aug. 20, 1897, received. 24042 F.

18

Not for publication.

EXHIBIT F.

Before the U. S. general appraisers at New York, Nov. 18, 1897.

In the Matter of the Protest 23975 F, 6504, of THE AMERICAN SUGAR REFINING CO. against the Decision of the Collector of Customs at New York as to the Rate and Amount of Duties Chargeable on Certain Merchandise Imported per Jno. Swan. Entered M'ch 15, 1897.

Opinion by Wilkinson, G. A.

The appellants appeared and submitted the case on the record.

We find upon the collector's report that duty was assessed upon the appraised value. The protest is overruled.

(Signed) H. M. SOMERVILLE,
GEO. C. TICHENOR,
CHAS. H. HAM,
Board of U. S. General Appraisers.

3 enclosures.
Entry and invoices returned herewith.
Protest received with the collector's letter of Sept. 7, 1897.

19

Not for publication.

EXHIBIT G.

Before the U. S. general appraisers at New York, Nov. 18, 1897.

In the Matter of the Protests $\frac{24041}{7211}$, $\frac{24042}{7212}$ F, of THE AMERICAN SUGAR REFINING CO. against the Decision of the Collector of Customs at New York as to the Rate and Amount of Duties Chargeable on Certain Merchandise Imported per Richmond, Entered M'ch 11, 1897; Bellaura, Entered M'ch 30, 1897.

Opinion by Wilkinson, G. A.

The appellants appeared and submitted the case on the record.

It appears that the appraiser made certain additions to market value, and no application for reappraisement was made.

We find upon the report of the collector that duty was assessed upon the value of the merchandise as returned by the U. S. appraiser.

The protest is overruled.

(Signed) H. M. SOMERVILLE,
GEO. C. TICHENOR,
CHARLES H. HAM,
Board of U. S. General Appraisers.

5 enclosures.
Entries and invoices returned herewith.
Protest received with the collector's letter of Sept. 8, 1897.

20 And for a certified statement of the facts involved in said matter, as ascertained by them, the said board states that said facts are fully set forth in the decision aforementioned, and that no other facts were ascertained by said board than such as are shown by said decision and other exhibits hereto attached.

H. M. SOMERVILLE,
CHARLES H. HAM,
Board of U. S. General Appraisers.

(Endorsed:) No. 2676. U. S. circuit court, southern district of New York. In the matter of the application of the American Sugar Refining Co. for a review of the decision of the board of U. S. general appraisers as to the rate and amount of duty on certain imported merchandise. Return of the board of U. S. general appraisers. U. S. circuit court. Filed Jan. 22, 1898. John A. Shields, clerk.

21 In the Circuit Court of the United States for the Southern District of New York.

In the Matter of the Application of THE AMERICAN SUGAR REFINING COMPANY for a Review of the Decision of the Board of United States General Appraisers as to the Rate, &c., of Duty on Certain Sugar Imported by Them in the Vessels and on the Dates Named Herein. Suit No. 2676.

Supplemental Return of the Board of United States General Appraisers to the Order of Hon. E. Henry Lacombe, Circuit Judge.

Dated New York, December 3, '98.

The board of United States general appraisers, sitting at New York, in response to the order of the court in the above matter, make the following supplemental return of the record and evidence taken by them in the above matter, and of the facts involved therein, as ascertained by them.

They state that on the 21st day of January, 1898, a return of the record and evidence was made to this court in the matter of an appeal taken by the American Sugar Refining Company, from a decision of the board of United States general appraisers as to the rate,

&c., of duty upon certain merchandise covered by their protests described as follows:

Coll's No.	Pro. No.	Protestants.	Vessel.	Date of entry.
6504	23975 F.	American Sugar Refining Co.	Jno. Swan.	M'ch 15, '97.
7211	24041 F.	"	Richmond.	M'ch 11, '97.
7212	24042 F.	"	Bellaura.	M'ch 30, '97.

22 On an examination of the decision (Exhibit "G") in the return in this case, it appears that a clerical error was made in the omission of the word "make," at the end of the second line thereof. The same should read, as it does read in the original minutes of said decision, "that the appraiser made certain additions to make market value," instead of "that the appraiser made certain additions to market value."

This supplemental return is made simply to correct such clerical error.

And for a certified statement of the facts involved in said matter, as ascertained by them, the said board states that said facts are fully set forth in the decision aforementioned, and that no other facts were ascertained by said board than such as are shown by said decision and other exhibits hereto attached.

H. M. SOMERVILLE,
GEO. C. TICHENOR,
J. B. WILKINSON, JR.,
Board of U. S. General Appraisers.

(Endorsed:) No. 2676. U. S. circuit court for the southern district of New York. In the matter of the application of the American Sugar Refining Co. for a review of the decision of the board of U. S. general appraisers as to the rate and amount of duty on certain imported merchandise. Supplemental return of the board of U. S. general appraisers. U. S. circuit court. Filed Dec. 5, 1898. John A. Shields, clerk.

23 U. S. Circuit Court, Southern District of New York.

In the Matter of the Application of THE AMERICAN SUGAR REFINING COMPANY for a Review of the Decision of the Board of General Appraisers as to the Rate and Amount of Duty on Certain Merchandise Imported by The American Sugar Refining Company, a Corporation Incorporated under the Laws of the State of New Jersey, per Jno. Swan, March 15, 1897; per Richmond, March 11, 1897; per Bellaura, March 30, 1897. Protest Nos. 23975 F—6504, 24041 F—7211, 24042 F—7212.

It is hereby stipulated and agreed that the word "reversed" in folio 7 of the petition of the American Sugar Refining Company herein, should read "affirmed;" so that the clause beginning on line two, at the top of page 3 of said petition, shall read: "Whereupon the invoices and all papers and exhibits connected therewith

were duly transmitted to the said board of general appraisers, which board proceeding to hear and determine the question of law
24 and fact involved, affirmed the collector's said decision in the premises."

Dated New York, January 24, 1898.

JOHN E. PARSONS,
Solicitor for Petitioner.
HENRY L. BURNETT,
United States District Attorney.
H. C. P.

So ordered.
E. H. LACOMBE,
U. S. Cir. Judge.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the application of the American Sugar Refining Company for a review of the decision of the board of general appraisers, &c. Stipulation & order. U. S. circuit court. Filed January 24, 1898. John A. Shields, clerk.

25 Circuit Court of the United States for the Southern District of New York.

In the Matter of the Application of THE AMERICAN SUGAR REFINING COMPANY for a Review of the Decision of the Board of U. S. General Appraisers as to the Rate, &c., of Duty on Certain Sugar Imported by Them in the Vessels and on the Dates Named Therein. Suit No. 2676.

To the circuit court of the United States for the southern district of New York:

The American Sugar Refining Company hereby applies for an order referring the above-entitled suit to one of the United States general appraisers as an officer of the court, to take and return to the court such further evidence as may be offered by the American Sugar Refining Company.

PARSONS, SHEPARD & OGDEN,
Solicitors for American Sugar Refining Company.

26 At a stated term of the circuit court of the United States of America for the southern district of New York, held at the United States circuit court rooms, in the post-office building, in the city of New York, on the 9th day of February, 1898.

Present: Hon. E. Henry Lacombe, circuit judge.

In the Matter of the Application of THE AMERICAN SUGAR REFINING COMPANY for a Review of the Decision of the Board of United States General Appraisers as to the Rate, &c., of Duty on Certain Sugar Imported by Them in the Vessels and on the Dates Named Herein. Suit No. 2676.

On application of the American Sugar Refining Company, through its solicitors, Parsons, Shepard & Ogden, it is—

Ordered, that this cause be referred to Hon. George H. Sharpe, one of the United States general appraisers, as an officer of this court, to take and return to this court such further evidence herein as may be offered by the said American Sugar Refining Company, and that the attorney for the United States and for the collector of the port of New York have reasonable notice of the time and place of taking such further evidence.

E. H. LACOMBE,
U. S. Circuit Judge.

27 (Endorsed:) U. S. circuit court, southern district of New York. In the matter of the application of the American Sugar Refining Company for a review of the decision of the board of U. S. general appraisers as to the rate, &c. Suit No. 2676. Order of reference. Parsons, Shepard & Ogden, solicitors for the American Sugar Refining Company, 111 Broadway, New York, N. Y. U. S. circuit court. Filed Feb. 9, 1898. John A. Shields, clerk.

At a stated term of the circuit court of the United States of America for the southern district of New York, held at the United States circuit court rooms, in the post-office building, in the city of New York, on the — day of April, 1898.

Present: Hon. E. Henry Lacombe, circuit judge.

In the Matter of the Application of THE AMERICAN SUGAR REFINING COMPANY for a Review of the Decision of the Board of U. S. General Appraisers as to the Rate, &c., of Duty on Certain Sugar Imported by Them in the Vessels and on the Dates Named Herein. Suit No. 2676.

On the annexed consent, and on the application of the American Sugar Refining Company, through its solicitors, Parsons, Shepard & Ogden, it is—

28 Ordered, that the time to take further evidence and return the same to this court, pursuant to the order dated February 9, 1898, be and it hereby is extended sixty days from date.

E. H. LACOMBE.

The above order is hereby consented to.

HENRY L. BURNETT,
U. S. Attorney.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the application of the American Sugar Refining Company for a review of the decision of the board of U. S. general appraisers as to the rate, &c. Suit No. 2676. Order. Parsons, Shepard & Ogden, solicitors for American Sugar Refining Company, 111 Broadway, New York, N. Y. U. S. circuit court. Filed Apr. 8, 1898. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

THE AMERICAN SUGAR REFINING CO. vs. UNITED STATES. } No. 2676.

To the circuit court of the United States for the southern district of New York:

The undersigned, a general appraiser under the act of June 10, 1890, to whom it was referred by this honorable court by an order made February 9, 1898, to take further evidence in the above-
29 entitled matter, do hereby return such further evidence taken by me pursuant to such order.

Dated New York, April 25, 1898.

GEORGE H. SHARPE,
United States General Appraiser, as an Officer of the Court.

United States Circuit Court, Southern District of New York.

THE AMERICAN SUGAR REFINING CO. vs. UNITED STATES. } No. 2676.

Before Hon. George H. Sharpe, as an officer of the court.

NEW YORK, *April* 6, 1898.

Appearances.

For the importers: H. S. Closson and A. K. Tingle.
For the United States: Henry C. Platt, ass't U. S. att'y.

Mr. CLOSSON: I produce from the files of the custom-house in the case of the entry by the John Swan and offer in evidence the report to the collector of the appraiser of merchandise, dated July 7, 1895. The report is as follows:

"To the collector: Pursuant to department letter of Sep-
30 tember 21, 1895, etc., I respectfully report upon invoice hereunto annexed as follows: Value of sugar per unit of quantity advanced from 6s. 8d. cwt. 87° the market value when shipped to 7s. 9d. cwt. 87° in the condition landed, owing to its increased value due to drainage on the voyage of importation. Invoice No. 9823; importer, A. S. Ref. Co.; vessel, John Swan."

In the case of the Richmond I offer in evidence the similar report of the appraiser to the collector, dated July 7, 1897, said report having been produced from the files of the custom-house. It reads as follows:

"* * * Value of sugar per unit of quantity advanced from 6s. 8d. cwt. 87°, the market value when shipped to 7s. 9d. cwt. 87° in the condition landed, owing to its increased value due to drainage on the voyage of importation. Invoice No. 8078; importer, A. S. Ref. Co.: vessel, Richmond."

And in the case of the Bellaura, there are two invoices and two

reports, which have been produced from the files of the custom-house. The reports both read the same, and are as follows:

"* * * Value of sugar per unit of quantity advanced from 7s. 2d. cwt. 86°, the market value when shipped to 7s. 11½d. cwt. 86° in the condition landed, owing to its increased value due to drainage on the voyage of importation. Invoice Nos. 22396–7; importer, A. S. Ref. Co.; vessel, Bellaura; date, May 10th, 1897."

It is stipulated by and between the parties hereto, that the entries and invoices produced from the custom-house, relating to the importations in this suit, are considered as in evidence herein.

It is admitted by counsel for the importers that the initials "W. C. J." attached to said reports, are those of William C. Jacobs, examiner of sugar in the appraiser's office.

Adjourned to April 13, 1898, 11 a. m.

31 THE AMERICAN SUGAR REFINING COMPANY
vs.
UNITED STATES.

Hearing resumed April 13, 1898.

Appearances.

For the importers: H. B. Closson and A. K. Tingle.
For the United States: Henry C. Platt, ass't U. S. att'y.

WILLIAM C. JACOBS, called as a witness on behalf of the United States, being duly sworn, testified as follows:

By Mr. PLATT:

Q. Mr. Jacobs, what is your official position?
A. Examiner—sugar examiner.
Q. At the appraiser's office in this city, this district?
A. Yes.
Q. How long have you held that position?
A. Since 1885.
Q. And in that position have you become familiar with the importations of sugar?
A. Yes, sir.
Q. From various countries to the United States?
A. Yes.
Q. I call your attention to the entry in this case by the John Swan, and to the report of the appraiser to the collector dated July 7, 1895. Is that there?
A. Yes.
Q. Did you make that report?
A. Mr. Remsen made the report.
Q. Did you examine the sugar on that importation?
A. I made the value.
Q. That report on that entry isn't in your handwriting, is it?
A. No, sir; that is Mr. Remsen's; he made the returns on the invoice.

Q. Are your initials on there anywhere, Mr. Jacobs?

A. No, sir; we had a ticket attached to the invoice, which
32 I made the value on; that don't go down officially; that is kept in the official records up in the stores.

Q. Is there nothing on those reports initialed by you in the case of John Swan, and the Richmond and the Bellaura?

A. No, sir; my official work is at the appraiser's office. On each one of those are pinned a ticket on which I make the return of the values. Then the writing up of the invoices is a mere form.

Q. You examined the sugar in these importations?

A. Yes, sir.

Q. And you made out the value?

A. Made the value.

Q. And that value, was it or was it not the market value of the goods at the time and place of exportation?

Mr. CLOSSON: That is the identical question which was objected to and excluded on my examination at the previous hearing. I asked the same question of Mr. Sharretts and it was held that I was not permitted to ask that.

Mr. PLATT: I had special reference to the time and place of exportation, not as to whether the market value was correct or not, but what market value his finding had reference to. He speaks of "market value" in his finding. What market value?

Q. What market value had you reference to in making your memorandum of the value of this sugar?

Mr. CLOSSON: I do not understand now that it appears that the witness made any return. He says that another man made the return. We understood that the papers which have been put in evidence had on them the initials "W. C. J."

Q. Your initials are not on the invoice?

A. Not on the return, what I call the return.

Q. The return is on the invoice?

A. The return is on the invoice.

Q. Are they attached to the reports?

A. There is a report on a department decision, another matter entirely.

33 Q. And your initials "W. C. J." are on those?

A. They are on all those.

Mr. CLOSSON: May it not appear that his initials are on the four returns which we put in evidence at the last hearing.

The WITNESS: That is in connection with instructions of the department on another matter.

Q. Are those initials which appear on the papers put in evidence at the last hearing your initials?

A. They are on the reports.

Q. Now, I repeat my question: What market value had you reference to in making your memorandum of the value of this sugar?

Mr. CLOSSON: I object to that question on the ground that the re-

turn or report shows on its face the market value taken and it is not competent by this witness to elicit testimony tending to show that some other value than that there stated was in fact adopted.

Objection overruled. Mr. Closson excepts.

A. The market value is the value of the sugars we examined at the port of shipment, the sugars we examined.

Q. At the port of shipment?

A. Yes, sir.

Q. In Brazil?

A. Yes, sir; wherever it may be.

Q. But in this case it was Brazil?

A. Yes.

Q. You mean by that the value at the port of shipment of the sugars you examined here?

A. Of the sugars we examined here.

Cross-examination by Mr. Closson:

Q. This so-called report bearing your initials contains this statement: "Value of sugar per unit of quantity advanced from 6s. 8d. cwt. 87°, the market value when shipped to 7s. 9d. cwt. 87° in the condition landed." Do I understand by the phrase "the market value when shipped" you intended the market value at the port of shipment and at the time of shipment?

A. We are expected——

34 Q. I must ask you to answer that?

A. I know nothing about that in one sense of the word. I took that merely with reference to the evidence given.

Question repeated and read to witness.

Q. Isn't that what you mean when you use the words: "The market value when shipped"?

A. If the memorandum and papers and contracts of the merchants are correct; I know nothing of that. An explanation of that order might show why that was done. It is a conceded fact that these sugars drain and moisture evaporates, although we have received sugar in almost exactly the same state as it was when it was shipped; we do receive sugar that hasn't drained a particle, Brazil sugars. If they stay in the storehouse there and drain there, when they get in the vessel their drain is through and they don't drain on the voyage. If they buy them green they will drain. Consequently an appraiser can't tell whether the sugars were bought green or whether they were bought drained. But we thought it was an injustice when the proof showed that the merchants had no intention of defrauding the revenue. I went personally to the Secretary himself, called down there and went over this matter with him, and he gave us the privilege of taking all the evidence, placing the evidence before us, reading it, and if we thought the statement was all right and truthful, we could state what we thought the drainage would be or had been, and what the value would have been had such occurred, and we gave the merchants the benefit of that.

Q. When you say "Secretary," you mean the Secretary of the Treasury?

A. The Secretary of the Treasury. It was done merely to help the merchants escape the penalty. That is how they came to be made out.

Q. You have stated, Mr. Jacobs, that it is a conceded fact that these Brazil sugars drain and they evaporate?

A. When bought green.

35 Q. Are you speaking of what goes on during the voyage?

A. It makes no difference where they are; they will drain anywhere.

Q. When they are packed in the hold of a vessel, with the hatches down, the evaporation is necessarily small, is it not, if any occurs?

A. The evaporation is small? Why so? The drainage takes place.

Q. But evaporation?

A. The evaporation should not be very large.

Q. The loss is almost wholly due in such cases to drainage?

A. Drainage; yes.

Q. What is drained off is molasses, is it not?

A. Generally turns into molasses; yes. What we call drainage may be very thick; it might be worth considerable and might not be worth much.

Q. It depends on the amount of moisture in the sugar?

A. Yes, and the thickness of the syrup.

Q. Whatever drains away goes into the bilge water and is lost, does it not?

A. Not necessarily; they may sell it; the Brazil pumpings are sold; it is too fine an article to throw away; trashy stuff is thrown away, but not Brazils, because the drainage is too rich.

Q. Do you know of any of the drainage in any of these cargoes being sold?

A. Yes, sir.

Q. Do you know what did become of it?

A. I know that a man by the name of O'Hare buys a lot of it.

Q. He buys it from the captains of the vessels, doesn't he?

A. He invoices it and pays the duty on it.

Q. You mean O'Hare?

A. He is one of them. There are three or four of them.

By Mr. TINGLE:

Q. How is it classified?

A. Pumpings or drainage; now if it should come up to a certain standard we would classify it as molasses; if it would come up higher than that we would classify it as sugar.

36 Q. How, under the ad valorem tariff?

A. The same thing.

Q. What rate of duty?

A. Forty per cent.; the same as sugar.

By Mr. CLOSSON:

Q. Will you examine these entries which I show you, being the entries in this suit, and state whether it appears from the record that any part of that drainage was entered by the American Sugar Refining Co.?

A. It was not, I don't think. I know they didn't enter them.

Q. If it was entered by any one, it was entered by some one in O'Hare's line of business?

A. I suppose so.

By Mr. PLATT:

Q. Do you know whether the importers in this case made any claim for any loss or damage on these importations on the voyage?

A. No, sir; they did not.

Q. Any damage allowance?

A. Not as I know of; I don't believe they did.

By Mr. CLOSSON:

Q. Mr. Jacobs, you know Mr. Sherer, do you not, who had testified in this proceeding?

A. Yes.

Q. How long have you known him?

A. I should judge I have known him in the neighborhood of sixteen years; I can't tell exactly.

Q. You know him as an expert sugar chemist?

A. As a chemist; yes.

Q. Have you not constantly met him as a sugar chemist of late years?

A. No, not as a sugar chemist.

Mr. PLATT: It is conceded that Mr. Sherer is an expert chemist.

Mr. CLOSSON: That is all the testimony we shall offer, with the possible exception of one witness on this question of drainage.

Adjourned to April 20, 1898, 11 a. m.

37 NEW YORK, *April* 20, 1898.

(Importers rest—Government rests.)
(Testimony closed.)

United States Circuit Court, Southern District of New York.

AMERICAN SUGAR REFINING COMPANY *vs.* THE UNITED STATES. } Nos. 2676 and 2689.
SAME *vs.* SAME.

TOWNSEND, *District Judge:*

Certain moist or green sugars were brought from Brazil into the port of New York while the act of 1894 was in force, upon which

duty was assessed at forty per cent. ad valorem under the provisions of paragraph 182½ of said act. It appears that there is an understanding, acquiesced in generally by shippers, importers and appraisers, that as the moist sugars from Brazil lose from fourteen to sixteen per cent. in weight on the voyage by drainage and evaporation, this percentage of loss shall be generally accepted as a basis of settlement of value at the port of entry. The board of appraisers, acting upon the basis of this so-called settlement, assumed such a loss of weight, and found, not the actual market value of the
38 green sugar as shipped from Brazil, but the increased market value of the dry sugar when it reached the port of New York. Thus the appraisers advanced the valuation of the sugar in the first importation from 6s. 8d. per cwt. 87°, the market value when shipped, to 7s. 9d. per cwt. 87°, owing to its increase in value from drainage on the voyage, and made similar advances in the other importations.

The question presented by these appeals is, whether the appraiser was authorized in thus advancing the valuation of the sugar, and whether the assessment of duty upon such advanced valuation is valid.

Section 10 of the customs administrative act of 1890 provides, *inter alia*, as follows:

"That it shall be the duty of the appraisers of the United States to ascertain, estimate and appraise the actual market value and wholesale price of the merchandise at the time of exportation to the United States in the principal markets of the country whence the same has been imported."

Counsel for the importer contends that this language refers to the merchandise in its condition in the foreign port and its actual value at the time of exportation to the United States, in the principal markets of the country whence it is imported. He claims that the phrase "actual market value of the merchandise" could not refer to the merchandise in its condition when it reached the port of New York, because such valuation would be merely speculative, within the reasoning in United States *vs.* Southmayd *et al.*, 9 How., 637, and Merritt *vs.* Welsh, 104 U. S., 694.

Counsel for the Government contends that the language of section 10 refers to the value in the foreign market of said merchandise in the condition in which it arrives at the port of New York. He claims that the mode adopted by the appraisers results in finding the actual market value at its place of exportation of such sugar as reaches this port.

39 Owing to drainage, there are less pounds of sugar on arrival here than when the ship left Brazil, but the cargo is actually worth as much as when it started. It appears, therefore, that if the sugar had been kept for the same length of time in Brazil, the same loss in weight by drainage and increase in value per pound would have taken place there, and the value of the cargo as a whole would not have been affected thereby. If this be so, I do not think the importers should gain by the decrease in weight coupled with an increase in value per pound. Unless, therefore, the appraisers

have acted in bad faith or have clearly committed a substantial error by their mode of ascertaining the market value in Brazil of the sugar on its arrival here, their decision should be affirmed. I am unable to find any such mistake or error (Passavant *vs.* U. S., 148 U. S., 214).

This construction is supported by the statement of Mr. Justice Curtis in Austin *vs.* Peaslee, 2 Fed. Cas., 235, that "the merchant is to pay duties on what is actually imported, not what is put up for export in the foreign country," and of Judge Colt, in Weaver *vs.* Sterry, 38 Fed., 493, that the true construction of the law is to assess duty only upon the quantity which arrives in port, and not upon the quantity which appears by the invoice to have been shipped, and by the language of Judge Lacombe in charging the jury in Reiss *vs.* Magone, 39 Fed., 105, that if what reaches this country has become more valuable by reason of shrinkage, it should, in fairness, be assessed at the higher value.

The decision of the board of general appraisers is affirmed.

For the importers—H. S. Closson and A. K. Tingle.
For the United States—Henry C. Platt.

(Endorsed:) U. S. circuit court. Filed Jan. 21, 1899. John A. Shields, clerk.

January 19, 1899.

40 At a stated term of the circuit court of the United States of America, for the southern district of New York, held at the United States circuit court rooms, in the post-office building, in the city of New York, on the 3d day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Hon. William K. Townsend, judge.

AMERICAN SUGAR REFINING COMPANY *vs.* UNITED STATES. } "A." Suit No. 2676.

The above cause coming on for hearing and determination before this court on the application of American Sugar Refining Company, importers, for a review of the questions of law and fact involved in the decisions of the board of U. S. general appraisers herein, and on the return of the board of general appraisers of the record and evidence taken by them, with their certified statement of the facts involved therein, together with their decisions thereon, and on further evidence taken therein:

Now, after hearing Henry C. Platt, assistant U. S. attorney, on behalf of the United States, for affirmance, and John E. Parsons, Esquire, of counsel for the said importers, for reversal, on motion of Henry L. Burnett, U. S. attorney, it is—

Ordered, adjudged and decreed, that there was no error in
41 said proceedings before said board of general appraisers, and that their decisions herein be and the same are hereby in all things affirmed.

WM. K. TOWNSEND,
U. S. Judge.

(Endorsed :) "A." Suit No. 2676. U. S. circuit court, southern district of New York. American Sugar Refining Company *vs.* United States. Judgment of affirmance. Henry L. Burnett, U. S. attorney. U. S. circuit court. Filed Feb. 2, 1899. John A. Shields, clerk.

United States Circuit Court of Appeals for the Second Circuit.

THE AMERICAN SUGAR REFINING COMPANY, Importer, Appellant,
against
THE UNITED STATES OF AMERICA, Appellee.

Now comes before the honorable the justices of the United States circuit court of appeals for the second circuit, the said The American Sugar Refining Company, importer, appellant, by John E. Parsons, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

I. In that the circuit court affirmed the decision of the board of general appraisers confirming the decision of the collector of
42 the port of New York, which held that the duty on the importation herein was assessed upon the appraised value thereof.

II. In that the circuit court did not hold that such duty ought to have been assessed and was not assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities at the time of exportation to the United States in the principal markets of the country from whence imported and in the condition in which such merchandise is there bought and sold for exportation to the United States or consigned to the United States for sale.

III. In that the circuit court held that the appraisers were authorized in advancing the value of the sugar from its actual market value when shipped as bought and sold in usual wholesale quantities at the time of the exportation to the United States in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States or consigned to the United States for sale, to a sum larger than such market value by a sum supposed to represent the increase in value from drainage on the voyage of so much of such sugar as actually arrived at the port of New York; and in that the circuit court held that the assessment of duty upon such advanced valuation is valid.

IV. In that the circuit court did not hold that any advance in the value of the sugar occurring subsequently to the date of the shipment thereof, from the place whence imported and due to changes in its condition occurring subsequently to its importation therefrom, does not constitute an element of dutiable value.

V. In that the circuit court did not reverse the said decis-
43 ion of the board of general appraisers and direct the collector to liquidate the entry on the basis of the actual market value or wholesale price of such merchandise as bought and sold in usual

wholesale quantities at the time of exportation to the United States in the principal markets of the country, whence imported and in the condition in which such merchandise is there bought and sold for exportation to the United States or consigned to the United States for sale; and to disregard any supposed subsequent increase in value from drainage on the voyage of so much of such sugar as actually arrived at the port of New York.

JNO. E. PARSONS,
Attorney for the American Sugar Refining Company, Importer.

(Endorsed:) No. 2676. U. S. circuit court of appeals for the second circuit. The American Sugar Refining Company, importer, appellant, against The United States of America, appellee. Assignment of errors. Jno. E. Parsons, attorney for importer, 111 Broadway, borough of Manhattan, New York city, N. Y. U. S. circuit court. Filed Feb. 27, 1899. John A. Shields, clerk.

44 United States Circuit Court of Appeals for the Second Circuit.

THE AMERICAN SUGAR REFINING COMPANY, Appellant,
vs.
THE UNITED STATES OF AMERICA, Appellee. } "A." Suit No. 2676.

The United States comes into court and says that there is no error either in the record or proceedings or in the giving of the judgment aforesaid, and prays that the said circuit court of appeals may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed.

HENRY L. BURNETT,
U. S. Attorney, for The United States, Appellee.

(Endorsed:) "A." Suit No. 2676. U. S. circuit court of appeals for the second circuit. The American Sugar Refining Company, appellant, *vs.* The United States of America, appellee. Joinder in error. Henry L. Burnett, U. S. attorney, for appellee. To John E. Parsons, Esq., attorney for appellant. Due service of a copy of the within joinder in error is hereby admitted. Dated New York, March 2nd, 1899. John E. Parsons, attorney for appellant. U. S. circuit court. Filed Mar. 2, 1899. John A. Shields, clerk.

45 United States Circuit Court for the Southern District of New York.

THE AMERICAN SUGAR REFINING COMPANY, Importer, Appellant,
against
THE UNITED STATES OF AMERICA, Appellee.

Know all men by these presents, that we, the American Sugar Refining Company, as principal, and Henry C. Mott, as surety, are

held and firmly bound unto the United States of America, in the sum of two hundred and fifty dollars ($250), to be paid to the United States of America, for the payment of which well and truly to be made we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated New York, the 24th day of February, 1899.

Whereas, the above-named American Sugar Refining Company has prosecuted an appeal to the United States circuit court of appeals for the second circuit from the decision and judgment rendered in the above-entitled suit or proceeding by the circuit court of the United States for the southern district of New York, on the 2d day of February, 1899:

Now, therefore, the condition of this obligation is such that if the above-named The American Sugar Refining Company shall prosecute said appeal to effect, and if it shall fail to make its plea
46 good, answer all damages and costs, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Sealed and delivered and taken and acknowledged this 24th day of February, 1899.

THE AMERICAN SUGAR REFINING CO. [SEAL.]
H. O. HAVEMEYER, *President.*
[SEAL.] HENRY C. MOTT.

Attest: C. R. HEIKE, *Sec'y.*

(2 stamps.)

UNITED STATES OF AMERICA, } ss:
State of New York, County of New York, }

On this 24th day of February, 1899, before me personally came H. O. Havemeyer and C. R. Heike, to me known, who being by me duly sworn, did depose and say, the said H. O. Havemeyer, that he resided in the town of Stamford, State of Connecticut; that he is the president of the American Sugar Refining Company; and the said C. R. Heike, that he resided at Jersey City, State of New Jersey; that he is the secretary of the American Sugar Refining Company, the corporation described in and which executed the above bond; and each for himself did say that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed to said instrument by order of the board of directors of said corporation; and that each signed his name thereto by like order.

ROB'T H. HUTCHINS,
[SEAL.] *Notary Public, N. Y. Co.*

47 UNITED STATES OF AMERICA, *Southern District of New York,* } ss.:

Henry C. Mott, being duly sworn, says: That he is a resident of the eastern district of New York; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

HENRY C. MOTT.

Sworn to before me this 24th day of February, 1899.

ROB'T H. HUTCHINS,
[SEAL.] *Notary Public, N. Y. Co.*

This bond is approved as to form and amount and sufficiency of surety.

Dated February 27, 1899.

____ ____,
U. S. Circuit Judge.

(Endorsed:) United States circuit court for the southern district of New York. No. 2676. The American Sugar Refining Company, importer, appellant, against The United States of America, appellee. Bond. John E. Parsons, attorney for appellant, 111 Broadway, borough of Manhattan, city of New York, N. Y. Approved as to form and also as to sufficiency of sureties, with reservation, however, to the appellee of the right at any time to examine the sureties under oath touching their liabilities and financial condition generally. E. Henry Lacombe, U. S. circuit judge. U. S. circuit court. Filed Feb. 28, 1899. John A. Shields, clerk.

48 United States Circuit Court, Southern District of New York.

THE AMERICAN SUGAR REFINING COMPANY, Importer, Appellant,
against
THE UNITED STATES OF AMERICA, Appellee. } No. 2676.

You will please take notice that the American Sugar Refining Company, the importer herein, appeals to the United States circuit court of appeals for the second circuit from the decision and judgment of this court rendered herein and entered on the 2d day of February, 1899.

Dated New York, February 25, 1899.

Yours, &c.,
JOHN E. PARSONS,
Attorney for American Sugar Refining Co., Importer, Appellant.

To Henry L. Burnett, Esq., United States attorney.

(Endorsed:) No. 2676. United States circuit court, southern district of New York. The American Sugar Refining Company, importer, appellant, against The United States of America, appellee. Notice of appeal. John E. Parsons, attorney for appellant, 111 Broadway, borough of Manhattan, city of New York, N. Y. U. S. circuit court. Filed Feb. 27, 1899. John A. Shields, clerk.

49 United States Circuit Court of Appeals for the Second Circuit.

THE AMERICAN SUGAR REFINING COMPANY, Importer, Appellant,
against
THE UNITED STATES OF AMERICA, Appellee.

To the United States circuit court of appeals for the second circuit:

The American Sugar Refining Company, the importer herein, hereby applies for the allowance of an appeal to the United States circuit court of appeals for the second circuit from the decision and judgment of the circuit court of the United States for the southern district of New York, entered herein on the 2d day of February, 1899.

Dated February 25, 1899.

Yours, &c.,
JOHN E. PARSONS,
Attorney for the American Sugar Refining Co., Importer.

The foregoing application is granted and appeal allowed.

Dated New York, February 27, 1899.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) No. 2676. United States circuit court of appeals for the second circuit. The American Sugar Refining Company,
50 importer, appellant, against United States of America, appellee. Petition for appeal. John E. Parsons, attorney for appellant, 111 Broadway, borough of Manhattan, city of New York. N. Y. A copy of the within paper has been this day received at this office. Feb. 28, 1899. Henry L. Burnett, U. S. attorney. U. S. circuit court. Filed Mar. 1, 1899. John A. Shields, clerk.

UNITED STATES OF AMERICA, *ss:*

To United States of America:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the second circuit, at the city of New York, on the 20th day of March, 1899, pursuant to an appeal on the part of The American Sugar Refining Company, importer herein, filed in the clerk's office of the circuit court of the United States for the southern district of New York, in a certain suit or proceeding entitled "The American Sugar Refining Company, importer, appellant, against The United States of America, appellee," to show cause, if any there be, why the decision of the United States circuit court in the said appeal mentioned should not be reversed, modified or corrected, and speedy justice should not be done in that behalf.

Given under our hand at the city of New York, in the southern district of New York, the 27th day of February, 1899.

E. H. LACOMBE,
U. S. Circuit Judge.

JOHN E. PARSONS,
Attorney for American Sugar Refining Co., Importer and Appellant Herein.

(Endorsed:) E. & A. B. No. 2676. U. S. circuit court of appeals for the second circuit. The American Sugar Refining Com-
51 pany, appellant, against The United States of America, appellee. Citation. John E. Parsons, attorney for appellant, 111 Broadway, New York, N. Y. A copy of the within paper has been this day received at this office. Feb. 28, 1899. Henry L. Burnett, U. S. attorney. U. S. circuit court. Filed Mar. 1, 1899. John A. Shields, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one (1) to fifty-seven (57) inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of The American Sugar Refining Company, appellant, against The United States of America, appellee (suit No. 2676), as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twentieth day of March, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the said United States the one hundred and twenty-third.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Stamp.)

52 United States Circuit Court of Appeals for the Second Circuit.

Nos. 34 and 35, October Term, 1899.

Submitted December 19, 1899; decided January 24, 1900.

THE AMERICAN SUGAR REFINING COMPANY, Appellant,
vs.
THE UNITED STATES, Appellee. } (2676.)

THE SAME, Appellant,
vs.
THE SAME, Appellee. } (2689.)

Appeals from the circuit court of the United States for the southern district of New York.

Before Judges Wallace, Lacombe, and Shipman.

SHIPMAN, *Circuit Judge:*

These two appeals from the circuit court for the southern district of New York involve the same question. In suit 2676, the American Sugar Refining Company imported from Brazil in March, 1897, certain sugars by the John Swan, the Richmond and by the Bellaura,

which were assessed for duty at forty per cent. under the tariff act of August 28, 1894. In January, 1895, the same importer imported, also from Brazil, by the Cuvier, other sugar, which was assessed at the same rate of duty. Brazilian sugars when bought in Brazil immediately after the manufacture are wet, and lose weight
53 upon the voyage to the port of entry, mainly by drainage, from ten to sixteen per cent., but they gain in value, because the drier the sugar the higher its test and there is a corresponding increase in value. This drainage is peculiar to Brazilian sugars though it exists to some extent in sugars from Puerto Rico. "It has, therefore, become customary to insert in the contract of sale, a guarantee that the loss in weight shall be a certain percentage, estimated by experts as the probable drainage of the particular cargo. If the loss is less than the stipulated percentage, the seller receives an additional payment in proportion; if it is greater he makes a corresponding allowance from the purchase price." This is called the basis of settlement and upon that ascertained amount of loss by drainage the appraisement was made in these cases. For example, in the case of the Bellaura the appraiser reported to the collector as follows: "The value of sugar per unit of quantity advanced from 7s. 2d. cwt. 86°, the market value when shipped, to 7s. 11½d. cwt. 86°, in the condition landed, owing to its increased value due to drainage on the voyage of importation." The importers protested that, under the proper construction of the statute, the rate and amount of duty chargeable upon the merchandise could be only on its market value, when shipped, and that duty upon "its increased value due to drainage on the voyage of importation," was illegally exacted. The collector's construction of the statute was affirmed by the board of appraisers and by the circuit court.

The question in the case is whether this increase of value on account of drainage during the voyage is not illegal because in violation of section 19 of the customs administrative act of June 10, 1890, which is as follows:

"SEC. 19. That whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities, at the time of
54 exportation to the United States, in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale, including the value of all cartons, cases, crates, boxes, sacks and coverings of any kind, and all other costs, charges and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, and if there be used for covering or holding imported merchandise, whether dutiable or free, any unusual article or form designed for use otherwise than in a *bona fide* transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subject if separately imported. That the words

'value' or 'actual market value' whenever used in this act or in any law relating to the appraisement of imported merchandise shall be construed to mean the actual market value or wholesale market price as defined in this section."

Prior to the passage of this act, the statutory provision on this subject had been the following:

Revised Statutes, sect. 2906:

"When an ad valorem rate of duty is imposed on any imported merchandise * * * the collector within whose district the same shall be imported or entered, shall cause the actual market value or wholesale price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same has been imported, to be appraised; and such appraised value shall be considered the value upon which duty shall be assessed."

The appellant insists that in the new section, in addition to the old requirement that the duty shall be assessed upon the actual market value or wholesale price in Brazil, the direction was carefully inserted that the value shall be upon the merchandise "in the condition in which the merchandise is there bought for exportation to the United States," and that this clause directly instructs
55 the appraisers to assess the value upon the sugar in the condition of moisture in which it is bought.

It was well settled by early decisions that if the quantity or weight stated in the invoice has been diminished by leakage or similar loss, the duty should be chargeable upon the quantity actually imported into this country (Marriot *v.* Brune, 9 How., 619; U. S. *v.* Southmayd, *id.*, 637); and the appellant asserts that whether the diminished quantity of sugar received at the port of entry is dry or wet, its value must be ascertained by the wholesale market price of the sugar in the condition in which it was bought for exportation, and if green sugar was bought, its enhanced value by drainage cannot be considered and that there is no statutory authority for endeavoring to ascertain what the dried sugar would have cost in Brazil if it had been bought in a dried state.

The question is of the legality of the appraisal, not of its accuracy, or its equity, but simply whether it is permitted by the statute, and that depends upon the meaning of the words "in the condition in which the merchandise is bought for exportation." The construction of the statute which would compel an ascertainment of value as the sugar was bought in Brazil when wet, though justified by the language of the statute if literally construed, is not sound. The intention of the statute was that the value of the imported merchandise shall be ascertained in accordance with the wholesale price of such merchandise in the principal markets from whence imported, in the condition in which such merchandise is there sold for exportation, whether packed or unpacked, specially prepared for a voyage or unprepared, and the expenses incident to placing the merchandise in condition for shipment are to be taken into account. The statute was not looking to the peculiar circumstances incident to any article which necessarily changed its value during a few weeks

wherever it was stored, and did not demand that the market price of sugar if bought green shall be the only standard for assessment
56 though it forthwith begins to lose in weight and to increase in value per pound. It is true that the word "condition" is broad enough to include any state or situation, but, as used in section 19, it was not intended to limit the appraiser to a condition which existed at the time of the purchase, but was immediately to become altered and to change until a new condition and value was reached. When the word is construed, the intent of the lawmaker in the section as a whole is to be regarded, which was to assess duty upon the value in the state or condition of the preparedness of the merchandise for shipment when sold, and to include the expenses of subsequent preparation, and thus to prescribe with more particularity and accuracy than had been done in section 2906 of the Revised Statutes the particulars which must enter into the assessment of value. The Brazilian sugar will, after its manufacture, surely lose weight by lapse of time and it is sometimes stored in Brazil until it becomes dry. It is not material whether it becomes dry by subsequent storage and drainage in Brazil or whether it is immediately shipped and becomes dry upon the voyage. The loss in weight and the increase in value are necessary incidents to the sugar of Brazil and it is dry sugar when it reaches New York. In this state of facts, it is incumbent upon the appraiser to ascertain the value of similar dry sugar in the markets of Brazil and not to be limited to its invoice price or market value, when wet.

The decision of the circuit court is affirmed.

John E. Parsons, for the appellant.

Henry C. Platt, assistant United States attorney, for the United States.

[SEAL.]

57 At a stated term of the United States circuit court of appeals in and for the second circuit, held at the court-rooms, in the post-office building, in the city of New York, on the 5th day of February, one thousand nine hundred.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, circuit judges.

AMERICAN SUGAR REFINING COMPANY, Appellant,
vs.
THE UNITED STATES, Appellee. } (2676.)

Appeal from the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the southern district of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said circuit court be, and it hereby is, affirmed.

It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

W. J. W.
E. H. L.
N. S.

58 [Endorsed:] United States circuit court of appeals, second circuit. American Sugar Refining Co. *vs.* United States. (2676.) Order for mandate. United States circuit court of appeals, second circuit. Filed Feb. 6, 1900. William Parkin, clerk.

59 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 58, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of American Sugar Refining Company against The United States (2676), as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 12th day of March, in the year of our Lord one thousand nine hundred, and of the Independence of the said United States the one hundred and twenty-fourth.

Seal United States Circuit Court of Appeals, Second Circuit.

WM. PARKIN, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled. Wm. P.]

59½ [Endorsed:] File No., 17,673. U. S. C. C. of appeals, 2nd circuit. Term No., 225. The American Sugar Refining Company, petitioner, *vs.* The United States. Filed March 17, 1900. (See No. 17697.)

60 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The American Sugar Refining Company is appellant and The United States is appellee (2676), which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme

61 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as afore-

said, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of June, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

62 [Endorsed:] Supreme Court of the United States, October term, 1899. No. 559. The American Sugar Refining Co. *vs.* The United States. Writ of certiorari. United States circuit court of appeals, second circuit. Filed Jul- 24, 1900. William Parkin, clerk.

63 In the United States Circuit Court of Appeals for the Second Circuit.

THE AMERICAN SUGAR REFINING COMPANY, Appellant,
against
THE UNITED STATES, Appellee. } No. 2676.

It is hereby stipulated and agreed that the certified transcripts of the record in the above-entitled action heretofore filed may be taken as the return to the writ of certiorari granted by the Supreme Court of the United States and filed with the clerk of this court on the 24th day of July, 1900.

Dated New York, July 27th, 1900.

JNO. E. PARSONS.
HENRY L. BURNETT, *U. S. Att'y.*

64 [Endorsed:] U. S. circuit court of appeals for the second circuit. The American Sugar Refining Company, appellant, against The United States, appellee. (No. 2676.) Stipulation. John E. Parsons, attorney for appellant, 111 Broadway, New York city.

65 To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed, and under the direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, August 2d, 1900.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

66 [Endorsed:] United States circuit court of appeals, second circuit. American Sugar Refining Co. *v.* United States. Return to certiorari.

67 [Endorsed:] File No., 17,673. Supreme Court U. S., October term, 1900. Term No., 225. The American Sugar Refining Co., petitioner, *vs.* The United States. Writ of certiorari and return thereto. Office Supreme Court U. S. Filed Aug. 6, 1900. James H. McKenney, clerk.

THE AMERICAN SUGAR REFINING COMPANY,

Petitioner,

vs.

THE UNITED STATES,

Appellee.

THE SAME

Appellant,

vs.

THE SAME

Appellee.

PETITION FOR WRIT OF CERTIORARI.

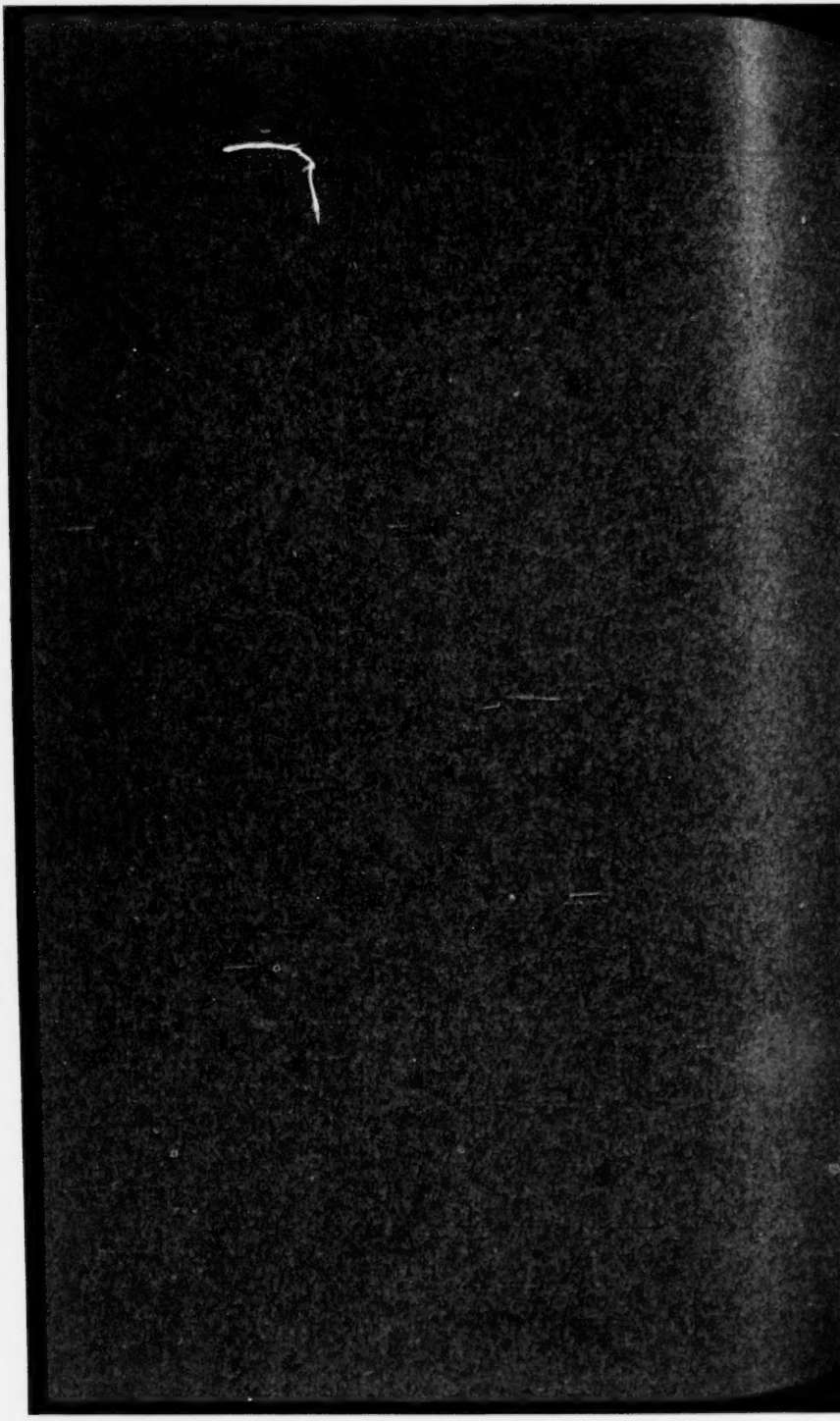
JOHN E. PARSONS,

Attorney for Petitioner,

No. 39 Broadway,

Borough of Manhattan,

New York City.



TAKE NOTICE that the within petition for a writ of *certiorari* will be presented, and an application made for the issuing of the writ, to the Supreme Court of the United States, on Monday, the 19th day of March, 1900, at the opening of the Court on that day, or as soon thereafter as counsel can be heard.

Dated March 8th, 1900.

Yours, &c.,

JOHN E. PARSONS,

Of Counsel for American Sugar Refining Company,

Appellant,

111 Broadway,

New York, N. Y.

To HON. HENRY L. BURNETT,

U. S. District Attorney for the Southern District of New York.

In the Supreme Court of the United States.

THE AMERICAN SUGAR REFINING COMPANY,
Appellant,

vs.

THE UNITED STATES,
(2676) Appellee.

THE SAME,
Appellant,

vs.

The SAME,
(2689) Appellee.

Petition for Writ of *Certiorari*.

TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The petition of The American Sugar Refining Company, a corporation organized and existing under the laws of the State of New Jersey, for a writ of *certiorari* directed to the Circuit Court of Appeals for the Second Circuit, to bring before the Supreme Court the causes above entitled, respectfully shows to this Court:

I. Heretofore and on or about the 31st day of January, 1895, your petitioner imported from Brazil by the Steamship "Cuvier," and entered for consumption at the Custom House, in the City of New York, a certain cargo of sugar, and thereafter, on the 11th, 15th and 30th days of March, 1897, by the Steamships "Richmond," "John Swan" and "Bellauri," respectively, three certain other cargoes of sugar. All of said merchandise was classified and assessed for duty at

forty per centum, not only of the actual market value and wholesale price thereof as bought and sold in usual wholesale quantities at the time of exportation to the United States in the principal markets of Brazil, whence it was imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, but also at forty per centum of an additional amount per hundredweight, supposed to cover an alleged increase in value of the sugar during the voyage of importation by reason of drainage upon the voyage.

II. In the case of the "Richmond" and the "John Swan" the fact of this addition of 1s. 1d. per cwt. by the Appraiser to the market value of the merchandise when shipped appears from reports from the Appraiser to the Collector as follows (Case 2676, fols. 87–89):

"TO THE COLLECTOR:

"Pursuant to Department letter of September 21st, 1895, etc., I respectfully report upon invoice hereto annexed as follows: Value of sugar per unit of quantity advanced from 6s. 8d. cwt. 87°, the market value when shipped, to 7s. 9d. cwt. 87° in the condition landed, owing to its increased value due to drainage on the voyage of importation."

In the case of "Bellauri," the fact of a similar addition of 9½d. per cwt. by the Appraiser to the market value of the merchandise when shipped appears from the report of the appraiser to the Collector as follows (Case 2676, fol. 89):

"Value of sugar per unit of quantity advanced from 7s. 2d. cwt. 86°, the market value when shipped, to 7s. 11½d. cwt. 86° in the condition landed, owing to its increased value due to drainage on the voyage of importation."

In the case of the "Cuvier" the fact of a similar addition appears from the testimony (Case No. 2689, fols. 63–67).

III. Your petitioner in each case duly protested and appealed upon the ground that under the proper construction of the statute the rate and amount of duty chargeable upon the merchandise could be only forty per centum of its market value when shipped, and that duty upon "its increased value due to drainage on the voyage of im-"portation" was illegally exacted. The Board of General Ap-

praisers upheld the decision of the Collector as to the rate and amount of duty chargeable upon the merchandise ; whereupon your petitioner duly applied to the Circuit Court of the United States for the Southern District of New York for a review of the questions of law and fact involved in such a decision.

IV. In the Circuit Court the decision of the Board of General Appraisers was affirmed ; upon the ground, as appears from its opinion (Case 2689, pp. 30 to 32 ; Case 2676, pp. 37 to 39), that under the proper construction of the Customs Administrative Act of 1890 the dutiable value of imported merchandise is " the value in " the foreign market of the said merchandise in the condition in " which it arrives at the port of New York," and not the value in the foreign market of the merchandise in the condition in which it was there shipped ; where these conditions are different and result in an increase in the value of the merchandise at the end of the voyage.

V. From the judgment of the Circuit Court entered upon this decision your petitioner duly appealed to the Circuit Court of Appeals for the Second Circuit. In that Court the decision of the Circuit Court was affirmed. The Court was of the opinion that the word " condition " in section 19 of the Customs Administrative Act " is broad enough to include any state or situation," and that, therefore, the contention of the importers that the act required the duty to be assessed upon the value of the merchandise in its condition as well in respect of the percentage of moisture which it then contained, as, otherwise, was " justified by the language of the statute, if literally construed." The Court further held, however, that the literal construction of the act " was not sound ; " and that the word " condition " in the act is not used in the " broad " sense as including " any state or situation ; " but that it means simply " the state or condition of the preparedness of the merchandise for shipment when sold."

VI. The questions of law arising upon this record, which, as your petitioner is advised by its counsel and verily believes, are of sufficient gravity and public importance to render it proper, in the interest of jurisprudence and uniformity of decision, that the Supreme Court shall review the conclusions reached thereupon by the Circuit Court of Appeals, are the following :

(1) Whether or not the condition in which, under the provisions of section 19 of the Customs Administrative Act, imported merchandise is to be valued at the time of its exportation to the United States, is its condition at the time of its exportation from the foreign country, or its condition at the time of its entry at the Custom House in the United States.

(2) Whether or not a decrease or increase in the value of of an imported article from its value at the time of exportation, occurring during the voyage from the port of exportation, to the United States, can be considered by the Appraiser in assessing the duty thereupon ; except in the single case provided for by section 23 of the Customs Administrative Act, where, owing to damage during the voyage, the importer is willing to abandon to the Government at least ten per centum of the total value or quantity of the invoice.

(3) Whether or not, in appraising merchandise, such as iron ore, sugar, etc., of which "water mechanically mixed is one of the nat- "ural and constant constituents," the appraiser, in assessing duty upon it, is bound to consider the percentage of water so contained in it at the time as of which he is by statute required to value it, or to consider only the percentage of water which it may so contain after its arrival in the United States.

(4) Whether, under the provisions of the Customs Administrative Act, the standard of value upon which the importer must pay duty is a shifting one—to wit, the value of the merchandise either at the time and place of exportation or at the time and place of importation, whichever may be the higher—or whether it is always the same ; and, if so, which of the two is, under the provisions of the statute, the standard of value.

VI. Your petitioner is advised and believes that the present case is one where it is proper for this court to issue a writ of *certiorari*, for the following reasons :

(1) The courts below have contessedly departed from the plain language of the statute in order to deprive the importer of the benefit of the fact that the merchandise imported by him is by virtue of its inherent qualities—and not by any intentional or artificial adaptation of it to the provisions of the statute—thereby subjected to a lower rate of duty than that which has been actually imposed.

(2) So far as is known, the case at bar was a case of first impression in the courts below, no other court having held that the phrase,

"in the condition in which such merchandise is there bought and "sold for exportation to the United States," was not to be given what the courts below have refused it, its "literal construction."

(3) The provision of the law in question, the literal meaning of which has been denied to it by the decision below, is one of daily application throughout all the ports of entry in the country. Upon the interpretation of it, the payment of large amounts of money depends. Upon only the four cargoes involved in these cases, the amount of duties payable by your petitioner have been increased by the rulings below in an amount exceeding $12,000.

It is a matter of the utmost importance to every importer, not only that no heavier duty shall be exacted upon his imports than was intended by Congress, but especially that in his buying, manufacturing and selling, he shall be able to rely with absolute certitude upon the standard of value which the government will apply to the imports both of himself and of his business rivals, in ascertaining the amount of duties to be exacted upon them.

But until this court shall review the determination of the court below, and either affirm or reverse it, it must remain wholly uncertain to what extent, if at all, the courts of other circuits will follow the action of the courts of the Second Circuit in refusing to give to the language of the act in question its literal interpretation. Until such determination by this court, therefore, all importers of merchandise subject to an *ad valorem* duty and liable to undergo changes in its condition during the voyage of importation, and a consequent increase or decrease in its value after its shipment, will be seriously embarrassed in the conduct of their business by the following, among other, considerations:

(a) Importers of such merchandise in other circuits than the second circuit must remain uncertain whether in any given case their merchandise will be appraised at its value when exported or at its value when imported. It will, therefore, be impossible for them to reckon in advance what will be the cost of their finished product.

(b) Importers of such merchandise in the Second Circuit must remain subject to the peril that the courts in other circuits may at any time refuse to follow to its full extent the decision of the court below; and may by such refusal at any time place them at a serious disadvantage with their competitors in business in other circuits.

(4) With great respect to the courts of the Second Circuit, it is submitted that their decision refusing to give to the language of

the Customs Administrative Act what they admit to be its literal meaning, is erroneous; and one which the courts of other circuits are altogether likely to refuse to follow, and this court, if the case shall be tried before it, to reverse. Among other grounds for this conclusion, stated in the appellant's brief below and herewith submitted, are the following:

(a) The decision is in avowed conflict with a fundamental rule of interpretation of tariff statutes, to wit, that if the literal construction of the language used enables the importer to escape with a less tax than that which the looser and more liberal construction of it would impose, the importer is entitled to the literal interpretation (United States v. Isham, 17 Wall., 496; American Net & Twine Co. v. Worthingto, 141 U. S., 468).

(b) The decision below ignores, and seems to be in conflict with, Section 2904 of the Revised Statutes, still in force, as follows:

" When the duty upon any imports shall be subject to be levied " upon the true market value of such imports in the principal " markets of the country from whence the importation has been " made, or at the port of exportation, the duty shall be estimated " and collected upon the value *on the day of actual shipment* when- " ever a bill of lading shall be presented," etc.

(c) The decision below ignores, and seems to be in conflict with, that of this court in the analogous case of *Earnshaw v. Cadwalader*, 145 U. S., 247, 259; where it was held by this court that it is the duty of the collector to assess the duty upon merchandise of which " water " mechanically mixed is one of the natural and constant constitu- " ents," in its condition at the time as of which he was required to appraise it, including whatever percentage of water it then contained, and without regard to the fact that this water is subsequently in part or in whole eliminated.

VII. The case is one in which the judgment of the said Circuit Court of Appeals, which has been entered, is made final by law, and the same cannot be reviewed except by *certiorari* issued out of this court. Accompanying this petition is a certified copy of the entire record in the said Court of Appeals, as required by Rule XXVII., Section 3, including a copy of the opinion of the said court.

Wherefore, your petitioner prays that this Honorable Court may be pleased to grant a writ of *certiorari* in the above-entitled cases to the said Circuit Court of Appeals for the Second Circuit to bring up such cases for its review and determination, and for such proceedings as shall seem best.

Dated New York, March 6th, 1900.

AMERICAN SUGAR REFINING COMPANY,
by
H. O. HAVEMEYER,
President,
Petitioner.

JOHN E. PARSONS,
Attorney for Petitioner.

UNITED STATES OF AMERICA,
State of New York,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

HENRY O. HAVEMEYER, being duly sworn, deposes and says that he is the President of the American Sugar Refining Company, the petitioner named in the foregoing petition, and that the said petition is true to the best of his knowledge and belief.

H. O. HAVEMEYER.

Sworn to before me this 6th day of March, 1900.

HERBERT FRAZIER,
[SEAL.] Notary Public,
N. Y. Co.

I hereby certify that I have examined the foregoing petition, and that in my opinion the same is well founded; and that the cause is one in which the prayer of the petition should be granted by the court.

JNO. E. PARSONS,
Of Counsel.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

559

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

THE AMERICAN SUGAR REFINING COMPANY,
Appellant,

AGAINST

THE UNITED STATES,
Appellee.
(2676.)

SAME

VS.

SAME.
(2689.)

Points for Appellant.

Appeals from judgments of the Circuit Court of the United States for the Southern District of New York, entered upon a decision of Judge TOWNSEND *affirming the action of the Board of General Appraisers in assessing duties upon certain cargoes of sugar imported in March, 1897, by the appellants, on the vessels "John Swan," "Richmond," "Bellaura" and "Cuvier."*

In three of these shipments the appraiser reported to the Collector as follows:

"The value of sugar per unit of quantity advanced "from 6s. 8d. Cwt. 87° [in the case of the 'Bellaura,'

" 7s. 2d. Cwt. 86°], the market value when shipped, to " 7s. 9d. Cwt. 87° [in the case of the 'Bellaura,' 7s. " 11½d. Cwt. 86°], in the condition landed owing to " its increased value due to drainage on the voyage of " importation."

In the fourth case the evidence shows that the appraisement was made in the same way.

In each case the Collector decided that the "rate " and amount of duties to be paid on such " merchandise, and the dutiable costs and " charges thereon according to law," was forty per cent., not of its value when shipped, but of its greater value " in the condition landed, " owing to its increased value due to drainage on the " voyage of importation." The importers duly protested that, under the proper construction of the law, the rate and amount of duty chargeable upon the merchandise could be only upon its market value when shipped, and that duty upon "its increased value due " to drainage upon the voyage of importation" was illegally exacted. The decision of the Collector upon this question of law was affirmed by the Board of General Appraisers and by Judge TOWNSEND in the Circuit Court. The importers now appeal to this Court.

The material facts, about which there is no dispute, are as follows:

Brazil sugars of the kind in question "at the time " of exportation to the United States" and "in the " condition in which such merchandise is there bought " and sold for exportation to the United States," usually contain from five to eight or nine per cent. of water (Case No. 2689, fol. 82). Sugar containing these percentages of water will, during the voyage from Brazil to the port of New York, lose in weight by drainage about double the percentage of water contained in it—*i. e.*, from ten to sixteen per cent. (Case No. 2689, fol. 81; Case No. 2676, fol. 101). As the amount of drainage is thus about double the percentage of moisture, it is obvious *a priori* and is proved to be the fact, that this drainage consists not of water, but of molasses, sometimes as thick as

to classify as sugar (Case No. 2676, fols. 104, 105; Case No. 2,689, fol. 75). Drainage of this kind "is too fine an article to throw away" and there are dealers in it in this city who regularly buy it from the captains of vessels, invoice it and pay duty on it (Case No. 2,676, fol. 105). The appraisement in this case, however, necessarily and avowedly proceeded upon the theory "that the decrease in weight is due simply to "the loss of so much water" (Case, No. 2,689, fol. 68).

The net landed weight in New York of these Brazil sugars being, as above explained, generally considerably less than the weight when shipped, and by a greater amount than the Brazil shipper always allowed for in drawing against it upon the importer, it has become customary to insert in the contract of sale, a guarantee that the loss in weight shall be a certain percentage, estimated by experts as the probable drainage of the particular cargo. If the loss is less than the stipulated percentage the seller receives an additional payment in proportion; if it is greater he makes a corresponding allowance from the purchase price (Case, No. 2,689, fols. 63, 81). It may also be stated that a similar stipulation is usually made as to the degree at which the sugar shall test under the polariscope, the seller receiving an additional price if it tests higher than the stipulated degree and making a corresponding allowance if it tests less. This polariscopic test is made in New York by experts agreed upon between the buyers and sellers; and under a ruling of the Secretary of the Treasury was, under the Act of 1894, commonly accepted by the appraisers as the correct one without the employment by them of independent experts. The matter of this polariscopic test, and of this agreement between the importers and the Government with regard to it, is in no way involved in this appeal; and is only referred to to explain certain testimony interjected into the case in regard to it by General Appraiser Sharretts (Case, 2689, fols. 64, 69-71, 73, 74).

The Customs Administrative Act of 1890 provides as follows:

SEC. 19. " Whenever imported merchandise is subject to an *ad valorem* rate of duty * * * the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities at the time of exportation to the United States in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States. * * * The words ' value ' or ' actual market value,' whenever used in this act, or in any law relating to the appraisement of imported merchandise, shall be construed to mean the actual market value or wholesale price as defined in this section."

Prior to the passage of this act, the statutory provision on this subject had been the following :

U. S. Rev. St., Sec. 2906 :

" When an *ad valorem* rate of duty is imposed on any imported merchandise * * * the Collector within whose district the same shall be imported or entered, shall cause the actual market value or wholesale price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same has been imported, to be appraised ; and such appraised value shall be considered the value upon which duty shall be assessed."

The change wrought in the law by the Act of 1890 was wholly in the direction of making it clear beyond cavil that the place, time and condition at and in which imported merchandise shall be valued in assessing *ad valorem* duties upon it shall be, respectively, (1) the port of export, not the port of import ; (2) the date of export, not the date of import ; (3) the condition when exported, not the condition when imported. To this end, the expression of the Revised Statutes, " the period of exportation," was changed to the more definite expression, " the time of " exportation," and the entirely new provision inserted : " in the condition in which such merchandise is there " bought and sold for exportation to the United " States."

It is in the face of this provision of the statute that the Government has, in the Circuit Court, succeeded in its effort to uphold the action of its appraiser, by whom, in his own language, "the value of sugar per "unit of quantity" was "advanced from 6s. 8d. Cwt. "87°, the market value when shipped, to 7s. 9d. Cwt. "87°, in the condition landed, owing to its increased "value due to drainage on the voyage of importation."

The opinion of the learned Judge presiding in the Circuit Court indicates that he overlooked this provision, first imported into the law by Section 19 of the Customs Administrative Act of 1890, that the condition in which merchandise must be valued, for the purpose of assessing duties upon it, is "the condition "in which such merchandise is there [viz., in the coun-"try whence imported] bought and sold for exporta-"tion to the United States." He not only cites as the statutory provision on the subject, not Section 19, but Section 10, which does not contain the provision in question (Case 2676, fol. 113); but he evidently understood that what is the proper condition in which the merchandise should be valued is still a matter of contention, open to argument.

He says:

"Counsel for the importer contends that this language refers to the merchandise in its condition in the foreign port and its actual value at the time of exportation to the United States in the principal markets of the country whence it is imported. He claims that the phrase 'actual market value of the merchandise' does not refer to the merchandise in its condition when it reached the port of New York, because," etc., etc. * * *

"Counsel for the Government contends that the language of Section 10 refers to the value in the foreign market of said merchandise in the condition in which it arrives at the port of New York."

The Court below here perhaps did injustice to the counsel for the Government in thus putting him in contention, not with the counsel for the importer, but with the plain language of the statute. The opinion, however, then proceeds to state what are, as the im-

porters understand, actually the grounds on which the Government seeks to sustain the appraiser in his apparent departure from the provisions of the statute, to wit:

"Owing to drainage, there are less pounds of sugar on arrival here than when the ship left Brazil, but the cargo is actually worth as much as when it started. It appears, therefore, that, if the sugar had been kept for the same length of time in Brazil, the same loss in weight by drainage and increase in value per pound would have taken place there, and the value of the cargo as a whole would not have been affected thereby. If this be so, I do not think the importers should gain by the decrease in weight coupled with an increase in value per pound."

The propositions of law stated or involved in this opinion will be considered hereafter, when the exact facts, upon which the questions of law are to be disposed of, have been ascertained. As to these facts, there are, according to the undisputed evidence, several erroneous assumptions in the passage above quoted from the opinion of the Court below.

1. It is not the fact, that "the cargo is actually "worth as much (on arrival here) as when it started." It is necessarily worth less, by exactly the amount of saccharine matter contained in the drainage. This is so great that according to the uncontradicted evidence, this drainage instead of being merely bilge water is molasses — "sometimes so thick as to classify as sugar"—"too fine an article to throw away;" regularly dealt in, duly invoiced at the Custom House and the duties upon it duly paid.

2. It is not the fact, that "if the sugar had been kept for the same length of time in Brazil the same loss in weight by drainage and increase in value per pound would have taken place there."

The only express evidence on this point is that the sugars "will drain anywhere," to some extent. The subject, however, calls for no evidence but the application of the elementary principles of physical science.

The drainage is caused by the presence of water in excess of the percentage which can be held by the sugar in a solid state. As sugar is ordinarily stored in warehouses, a very large proportion of this water escapes by evaporation, harmlessly. Under such circumstances it is only so much of the excess as is unable to escape by evaporation which, in filtering downwards through the sugar, dissolves some part of it before passing out as drainage. In the closely packed and confined hold of a vessel, on the contrary, the dissipation of the moisture by the harmless process of evaporation is almost wholly prevented. Substantially all the water contained in the sugar must filter downwards through tier upon tier of bags to the bottom, taking toll of each successive bag through which it passes until the saturation point is reached, and it passes into the bilge as molasses so thick often "as to classify as sugar."

3. It is not the fact, that "the value of the cargo as "a whole would not have been affected thereby" (viz., by the drainage). This is obvious from the considerations already adverted to. The residue left after the drainage is, undoubtedly, pound for pound, of higher saccharine percentage, and, therefore, value, than when shipped. But the total increase in value thus obtained necessarily falls short of compensating for the loss by drainage by exactly the value of the saccharine matter lost in the drainage.

First Point.

The question raised by this appeal is one of the construction of the law and the facts respecting the classification of imported merchandise, and the rate of duty imposed on it under such classification. It was, therefore, properly presented under the

provisions of Section 14 of the act by protest and appeal to the Board of General Appraisers in the first place, and thereafter under the provisions of Section 15, by the application to the Circuit Court for a review of the questions of law and fact involved in the decision, and by this appeal is now regularly before this Court for review.

In three of the cases it appears from the express statement of the appraiser's report that the value of the sugar per unit of quantity was "advanced from" "the market value when shipped" to a higher figure "in the condition landed owing to its increased value "due to drainage on the voyage of importation." In the *Cuvier* case the same thing appears from the evidence taken. The cases are, therefore, brought directly within the principle of the following decision :

U. S. vs. Herrman, 91 Fed. Rep., 116 :

By the Court, Wallace, C. J., Lacombe and Shipman, JJ., concurring :

"If the collector, in deciding the dutiable value of the importations in controversy, proceeded upon an appraisement by which that value was found by adding a commission to the wholesale price or market value of the merchandise in the foreign market at the time of exportation, that decision was reviewable by the board of general appraisers under Section 14 of the Customs Administractive Act ; and the decision of the board affirming the collector's decision was properly reversed by the Circuit Court, because such a decision would have proceeded upon an improper construction of the law" (U. S. vs. Passavant, 169 U. S., 16).

Second Point.

The one essential feature which differentiates the taxation of a civilized government from the arbitrary exactions of a barbaric one is that it is absolutely fixed, uniform, unvarying, calculable in advance ; never imposed *ex post facto*.

In a business where the success of the manufacturer depends upon the fractions of a cent by which he can diminish the cost of his manufactured product, it is indispensable that he shall be able to reckon beforehand with proportionate exactness the various factors of this cost, not the least important of which is the amount of the duty which the Government will exact upon the imported raw material. Any construction of a tariff law which makes such a computation impossible and permits an appraiser to depart from the plain letter of the law upon which the merchant has reckoned, for the sake of achieving what the appraiser or his superiors may consider "equitable" results, leaves the merchant to conduct not a business, but a lottery.

Merritt vs. Welsh, 104 U. S., 694, 702:

BY THE COURT: "If the quantity of saccharine matter in sugar, or its state of advancement from the raw state to a condition of refinement, is desirable as a dutiable standard, let it be so declared by the laws; and then the merchant will know on what he has to depend. Uncertainty and ambiguity are the bane of commerce. Discretion in the custom-house officer should be limited as strictly as possible. It has been said, with much truth, 'Where law ends, tyranny begins.'"

Third Point.

In full recognition of this principle, the legislative department of the Government has, in language noteworthy for its clearness and particularity, announced to the sugar refiner not only the rate of duty which it will impose upon his imported merchandise, but the methods to be pursued and the standards to be adopted by the executive department of the Government in assessing these duties.

To these conditions the sugar refiner had the right, and is, indeed, invited to adjust his business. There-

after if by importing raw material, different from what he had previously imported only in some particular immaterial to himself and his customers, he could effect a substantial saving in the amount of duties payable upon his merchandise, it was his legitimate right and privilege to do so. So long as Congress does not interfere to deprive him of this right, it certainly is not the appropriate function of any member of either the executive or the judicial department of the government to do so, merely because "he does not think the importer should gain" by the successful adaptation of his business to the conditions under which the legislative department has authorized him to conduct it.

Upon precisely this ground the Courts have already held, for instance, that if the dealer in woolens can escape the payment of a high rate of duty upon his goods by importing, instead of pure woolens, woolens with an admixture of cotton so slight as to be wholly immaterial for any purpose except to bring them under a particular classification of the tariff act, or the sugar importer can accomplish the same result in his business by importing, instead of light colored sugars, sugars of a darker hue but for his purposes equally as good, the saving to the importer is in each case a legitimate one, which neither the customs officers nor the Courts have the right to prevent.

It must, then, be equally true, that if the sugar importer found it, under the Tariff Act of 1895, to be to his advantage to import a larger percentage of green or wet sugars, and a smaller percentage of dry or cured sugars than theretofore, the opportunity to lessen thereby the cost to himself of his raw material is a wholly legitimate one, by which he not only "should gain," but must gain, at the peril of being crowded out of business by less Quixotic competitors.

Seeberger vs. Farwell, 139 U. S., 610:

By the Court: "The Court [below], in its opinion, said that the Collector, in classifying the goods, evidently assumed that the purpose of mixing the cotton with the wool was to secure a low classification, and assumed also that so small a quantity of cotton would

not materially change the character of the goods as merchandise, when offered for sale to consumers, and, therefore, looked upon the contention of the plaintiff for a lower classification as an attempt to defraud the revenue, and accordingly imposed the higher duty; that, Congress having made special provision for a lower rate of duty upon goods when composed in part of wool, without naming how much of other material should enter into their composition in order to secure such lower rate of duty, the Court was of opinion that manufacturers and importers had the right to adjust themselves to the foregoing clause of the tariff, and to manufacture the goods with only a small percentage of cotton, for the purpose of making them dutiable at the lower rate; that, although the goods in question contained so small an amount of cotton that the ordinary dealer in them and the ordinary examiner would not detect the cotton without a close and careful examination, that did not change the legal right of the plaintiffs to bring their goods within the operation of the clause involved by the admixture of even a small percentage of cotton, if they could do so; and that goods made of 94 per cent. in bulk of wool and 6 per cent. in bulk of cotton fairly came within the description of goods composed in part of wool.

'*We concur in this view.*"

Merritt vs. Welsh, 104 U. S., 694–701:

By the Court: "The color standard [*var.*, the condition of the merchandise when shipped, as a standard] has come to be a precarious one. Still, if the government chooses to adhere to it, it is bound by it. If Congress, as it has done, adopt the color standard, it is not for the customs department to adopt a different one. When Congress chooses to do this, it will be time enough for the custom house to follow. As before said, Congress alone has the power to lay taxes and duties.

"Great stress is laid on the charge that sugars are manufactured in dark colors on purpose to evade our duties. Suppose this is true; has not a manufacturer a right to make his goods as he pleases? If they are less marketable, it is his loss; if they are not less marketable, who has a right to complain? If the duties are affected, there is a plain remedy. Congress can always adopt such laws and regulations as it may deem expedient for protecting the interests of the government. If, in the case under consideration, a color

standard is insufficient, a different one is ready to hand—that of the polariscope, or other chemical test. If the quantity of saccharine matter in sugar, or its state of advancement from the raw state to a condition of refinement is desirable as a dutiable standard, let it be so declared by the laws, and then the merchant will know on what he has to depend. Uncertainty and ambiguity are the bane of commerce. Discretion in the custom house officer should be limited as strictly as possible. It has been said with much truth, 'Where law ends, tyranny begins.' * * *

"Congress did not leave any room for doubt as to its meaning. It used apt terms to express it—terms free from all ambiguity and obscurity. If the test adopted fails to effect the desired object, the inconvenience or loss to the treasury need only be temporary; it can be changed at any moment. And it is better to submit to a temporary inconvenience than to set the laws all afloat by laying down a canon of construction which leaves the plain words, and seeks to spell out, or guess at, the supposed intent of the legislature, contrary or supplementary to that which is clearly embodied in the words it has used."

Fourth Point.

Among the restrictions which Congress has proclaimed to the sugar refiner will be observed by all the departments of the Government in assessing duties upon his imported raw material there are at least three, each one of which it is in turn necessary to ignore or evade in order to sustain the action of the appraiser in this case.

1. The first of these conditions is that what the refiner is to be required to pay duty upon is "sugar;" another that the duty which he must pay upon this is forty per cent. of its value at the time it is exported from the foreign country, and in the condition in which it is there bought and sold for exportation.

In other words, the duty is imposed not upon the chemically pure substance known as sucrose (C_{12} H_{22} O_{11}), but upon the familiar commercial article of mer-

chandise known as "sugar," a compound not only of sucrose, but of various impurities, and of water constituting from one to eight per cent. of its weight. The amount of duty is to be forty per cent. of the value in the foreign country of each pound imported of this compound as these elements consisted in it at the time of exportation.

So long, therefore, as the merchandise which it is the duty of the appraiser to value at its actual market value in the foreign market at the time of exportation, and in the condition in which it is there bought and sold for exportation, was at that time and in that condition "sugar" and is still "sugar" when landed, the percentage of water which it contains when landed or the additional percentage of water which it lost during the voyage of importation is a wholly irrelevant matter to the appraiser, which he has no right to consider for any purpose. He must take each "unit of quantity," be it hundredweight or bushel, of sugar actually landed, and ascertain its condition when exported. If he finds that at that time and place the percentage of water it contained was large, and its value per pound correspondingly small, he must appraise it as he finds it then to have consisted, with the different percentages of sucrose, impurities and water as they then were. He has no more right to eliminate from his consideration the water it then contained simply because at a subsequent stage of its history, with which he has no concern, some or all of this water was, in whatever way, expelled, than he has to disregard every other constituent element of it except the sucrose and appraise that only. The fact that it is "sugar," not "sucrose," which is subject to duty and required to be appraised, forbids that course in either case.

This rule of law the Government would find no difficulty in admitting, if the duty were a specific one per pound, and it were the importer who was seeking to eliminate the water from the merchandise to be appraised and taxed. There cannot be one rule for the importer and another for the Government upon the

same subject. What the rule is upon this subject has already been settled by authority.

Earnshaw vs. Cadwalader, 145 U. S., 247, 259:

Under the provisions of the tariff act iron ore was charged with a duty of 75 cents per ton landed. The plaintiff gave evidence tending to show that a considerable percentage of the weight on which the duty had been assessed by the collector was made up of water mechanically present in the ore; that the amount of such water which iron ore contained varied according to circumstances from practically nothing up to 25 per cent.; and that practically all the moisture would dry out in the sun or would be driven out by heating the ore to the boiling point of water. The importer contended, therefore, that he could be obliged to pay duty only upon the iron ore itself, and not upon the percentage of water mechanically contained in it.

By the Court: "It appeared by the evidence that dried ore was an article unknown to commerce or trade. * * * That water mechanically mixed is one of the natural and constant constituents of the iron ore of commerce, both domestic and foreign; and that there is no warrant for the conclusion that the iron ore of the statute is limited to dry ore, or ore with such mechanically mixed water excluded."

Held, that it was the duty of the collector to assess the duty upon the ore in its condition at the time as of which he was required to appraise it, including whatever percentage of water it then contained.

2. The third of the conditions referred to is that it is only upon "articles imported" that the duty can be imposed. Not only is it "sugar," not sucrose, which the appraiser must appraise at its value when and where exported, and in the condition in which it then was; but it is only so much of the sugar as actually reached the United States and was landed there—to wit, the eighty-four per cent. of the amount originally exported—that the appraiser can thus appraise. No duty can be imposed upon the sixteen per cent. of the sugar originally exported which, during the voyage, was lost in the bilge and abandoned by the importer. It is simply an indirect way of doing what is thus forbidden, to say that

the "sucrose," though not the impurities and the water, of this sixteen per cent., has, since the date as of which the appraisement must be made, for the most part passed into the eighty-four per cent. landed. "Sucrose" is not an article of commerce known to the tariff law. If 16 out of every 100 pounds of "sugar" shipped has, as sugar, disappeared during the voyage, it has thereby escaped the jurisdiction of the appraiser. He cannot pursue a part of its former constituent elements into something else, and tax it there. What is left subject to the exercise of the appraiser's jurisdiction is simply the 84 pounds of sugar remaining to be appraised by him at its value when exported, irrespective of any subsequent change in its condition for good or bad. The case is not one of a claim by the importer for some allowance for damage sustained during the voyage by merchandise actually imported, though in a damaged condition. The question is simply whether the importer shall be required to pay duties upon a dutiable article shipped on board for export, but lost during the voyage, and, therefore never imported; and the fallacy of the argument of the Court below, it is respectfully submitted, consists precisely in evading this question by using the same word "cargo" in two different senses—first, as denoting the sugar shipped on board; secondly, that landed in New York —and treating both as the same thing.

Marriott vs. Brune, 9 Howard, 619:

Under the Act of July 30, 1846, imported sugar was taxed at 30% *ad valorem*. The sugar in question was imported in loose hogsheads from Puerto Rico and lost by drainage during the voyage about five per cent. of the invoice weight. The collector had assessed duty upon the invoice weight, refusing to make any allowance for leakage and drainage. Held error.

HEAD NOTE: "The true construction of this law is that the duty should be charged only upon that quantity of sugar and molasses which arrives in our ports, and not upon the quantity which appears upon the invoice to have been shipped."

BY THE COURT: "The general principle applicable to such a case would seem to be that revenue should be

collected only from the quantity or weight which arrives here, that is, what is *imported*, for nothing is imported till it comes within the limits of a port. * * * When the duty was specific on this article, being a certain rate per pound before the act of 1846, it could of course extend to no larger number of pounds than was actually entered. The change in the law has been merely in the rate and form of the duty and not in the quantity on which it should be assessed. On looking a little further into the principles of the case, it will be seen that a deduction must be made from the quantity shipped abroad whenever it does not at all reach the United States, or we shall in truth assess here what does not exist here."

Shaw vs. Dix, 72 Fed. Rep., 166 :

The collector exacted duties on the whole number of cocoanuts specified in the invoice, deciding that section 23 of the act of June 10th, 1890, was applicable, and that under the ruling in U. S. vs. Bache, 59 Fed. Rep., 762, the shortage was a damage to the merchandise, for which no allowance could be made, as it did not amount in any case to ten per cent. of the total quantity of the invoice, and there could consequently be no abandonment to the United States as required by that section. The importers duly protested, claiming that they asked for no allowance for damage to the cocoanuts which actually arrived, and that they desired to pay for all cocoanuts discharged from the vessel, whether sound or damaged ; but that the mass of matter which remained after discharging the cargo represented cocoanuts which, having rotted or been broken up on thevoyage, ceased to be merchandise of any kind.

By the Court : It is quite true that the allowance for damage to imported goods is expressly regulated by section 23 of the act of June 10, 1890. But it is true now, as it was before that act was passed, that duty is not to be assessed on an article which does not arrive in this country " (Marriott vs. Brune, 9 Howard, 619). * * *

" In U. S. vs. Bache, 59 Fed. 762, the facts presented raised a very different issue. The importation was glass in cases or packages, and a considerable breakage of glass in the cases occurred during the voyage. The cases all arrived. The contents were not destroyed but damaged. It was clearly a case within the language of section 23."

3. The application of the principles just considered is in nowise affected by the fact that the probable loss during the voyage of a given percentage of the sugar shipped, is considered by the purchaser and seller when the contract of sale is made, and is in a way provided for either by a direct discount from the current market price or by a guarantee that the loss shall not exceed a fixed percentage or both.

U. S. vs. Southmayd, 9 Howard, 637 :

This case involved the same question as Marriott vs. Brune, *supra*, with the additional fact in evidence "that the purchaser abroad takes into consideration the probable loss (by drainage during voyage to the United States) in fixing the price to be paid."

By the Court: "It is argued that the price abroad is, therefore, lower in this proportion on this account, and hence that no deduction should be made here for what is taken into consideration there. But the first answer to this position is that if the price is fixed too low there or lower than it should be on the quantity likely to be saved and to arrive here, it is the duty of the appraisers to raise the price, and it must be presumed they would raise it if required by all the facts. [In the cases at bar the appraisers did without protest from the importers exactly this. The "6s. 8d. Avt.," which they found to be "the market value when shipped," was obtained by them precisely by "raising the price, a less amount than the "6s. 8d. Avt.," to that figure as the true "market value when shipped." It is not of this legitimate "raising of the price" to obtain the true market value, of which the importers here complain ; but of the further addition to the market value thus raised, of six pence per cent., to cover the increase in value during the voyage.] In the next place this calculation by the merchant abroad in fixing the price is a mere speculative or commercial one connected with the profit and loss, and not with a view to the duties to be assessed here. Again, the duty here is regulated by law and not by any estimates of such a character by men of business, and by law it is imposed on the quantity entered here and not the quantity shipped abroad and on the true price abroad as estimated by the appraisers, and not necessarily as estimated by the owners. Again, if the owner was benefitted by this drainage in the improved quality of the sugars

or molasses left, and to the extent of the loss in weight, there might be some equity in considering him liable for the weight abroad. But, as explained in the preceding case, such does not seem to be the current of the evidence. There are cases likewise of imports here, made by the producers of the article abroad. In those, this supposed element in the price to prevent the justice of a reduction in the weight here could hardly exist, as there is no sale abroad, and this shows the incongruity and want of applicability of such a fact to constitue a rule in any case for estimating *ad valorem* duties."

Fifth Point.

Except for the limitations of the Constitution, and the considerations of public policy referred to in Point Second, it would doubtless have been competent for Congress to provide that imported merchandise shall be appraised both at its value in the foreign country at the time when exported, and in its then condition, and at its value here at the time when landed here and in its then condition ; and that the duty shall be assessed upon whichever of the two values thus ascertained shall be the higher ; as was substantially the actual practice pursued in the case at bar. Certainly, it was open to Congress to adopt in advance whichever of these two standards of value it should consider on the whole the more favorable to the Government and the more just to the importer. In the exercise of this power it has for the present, at any rate, adopted the former ; and, it must be supposed, for the reason that, upon the whole and in the majority of cases, it was of the opinion that this standard was the better.

Doubtless no fixed standard can be adopted to which the importer will not be able, in some cases, at any rate, to adapt his business more successfully than was anticipated by Congress, or is pleasing to the custom officials or to the Courts. Whatever the working of

the existing standard of value in the case at bar, there is every reason to suppose that, in the vast majority of cases, Congress was right in anticipating that it would work to the advantage of the Government. Green sugars are probably one of the very few articles of merchandise which do increase in value after the time, as of which they must be appraised, when they are laden aboard the vessel for export to this country. Certainly a long sea voyage is not commonly regarded as likely to enhance the value of most articles of trade. Green sugars and Madeiras are, perhaps, the only exceptions. It was with the wisdom of experience that Congress determined in taxing imported merchandise, to take its value before rather than after it had been subjected to the perils of a sea voyage. Having adopted this alternative, the statute shows that Congress has relentlessly pursued every advantage which this choice gives it. After the value of merchandise at the date of exportation has once thus been ascertained, no allowance for damage sustained by it during the voyage, it is provided by Section 23 of the Act of 1890, shall be made in the assessment and liquidation of duties thereon. Full duties upon the cargo as laden on board must be paid by the importer, unless he is willing actually to abandon to the Government as not merely damaged, but destroyed, more than 10 per cent. of the total invoice. If the Government is to be thus rigorous in holding the importer to the value of the merchandise at the time of exportation, there surely need be no scruples felt by the Courts in allowing the importer his legitimate right to hold the Government to the same value on the rare occasions when it is to his advantage to do so.

Last Point.

The judgments of the Circuit Court should be reversed and the cases remanded to it with instructions to assess the duty only upon the amount found by the appraiser to have been the market value of the cargoes when shipped, and not upon any increase in value during the voyage.

H. B. Closson,
Jno. E. Parsons,
Of Counsel for Appellant the American Sugar Refining Company.

No. 225
Brf. of Parsons 35 for Petitioner.

SUPREME COURT U.S.
FILED
MAR 19 1900
JAMES H. MCKENNEY,
Clerk.

Filed Mar. 19. 1900.

Supreme Court of the United States.

AMERICAN SUGAR REFINING COMPANY,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JNO. E. PARSONS,
Of Counsel for Petitioner.

C. G. Burgoyne, Walker and Centre Streets, New York.

Supreme Court of the United States.

AMERICAN SUGAR REFINING COMPANY,
Appellant and Petitioner,

vs.

THE UNITED STATES,
(2676.) Appellee and Respondent.

THE SAME,
Appellant and Petitioner,

vs.

THE SAME,
(2689.) Appellee and Respondent.

Brief for Petitioner.

The construction put by the courts below upon the provisions of the Customs Administrative Act in question, is palpably unfair to the importer. It compels the Government to take toward him an attitude which is unconscionable. It introduces into the administration of the tariff that uncertainty which this Court has declared to be "the bane of commerce."

These are the reasons which are believed to justify the appellants in asking this Court, by writ of *certiorari*, to inquire whether the construction attended by such results is in reality warranted by the language employed by Congress, or whether such an intention can be justly imputed to it.

Throughout the entire act one consistent purpose runs, declared with painstaking clearness—to wit, that the taxable value of imported merchandise shall be fixed immutably at its value on the

day of actual shipment" from the foreign port, as it then subsists; provided only it shall so far survive the voyage as still to constitute "merchandise" when actually imported into this country.

Congress evidently contemplated the possibility of a change in the condition, and consequently in the value, of merchandise during the voyage of importation—sometimes in the direction of an increase in value and sometimes in the direction of a decrease. The provision for the latter case is found in Section 23 of the act, and is uncompromisingly clear:

"No allowance for damage to goods, wares and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon. But the importer thereof may, within ten days after entry, abandon to the United States all or any portion of goods, wares and merchandise included in any invoice, and be relieved from the payment of the duties of the portion so abandoned, provided that the portion so abandoned amount to ten per centum or over of the total value or quantity of the invoice."

The importer is informed, in other words, and in language to which no Court has as yet ventured to give other than its "literal" meaning, that, no matter how much his merchandise may have deteriorated in value during the voyage, he must pay duty upon the whole of it at its value at the commencement of the voyage; unless, indeed, he be willing to abandon it utterly to the Government.

This provision is harsh enough, even if countervailed by the provision, which the appellant contends is contained in Section 19 of the act, that the Government will adhere to the same standard of value, even if during the voyage of importation the change in the merchandise be in the direction of an increase in value. But the construction placed upon this section by the Courts below deprives the importer of even this imperfect compensation. It places the Government in the position of exacting of the importer of merchandise which undergoes a change of condition, and therefore value, during the voyage, that the dutiable value shall be ascertained before the change, if for the worse; but after the change, if it be for the better.

No importer, therefore, if uncertain whether or not the merchandise will increase or decrease during the voyage, can calculate in advance the duties which he must pay upon his imports. He is, in a new sense, always at the peril of the seas, and with no insurance.

Nor are these the only evils of the construction of the statute adopted by the Courts below. It brings about such absurd results as are presented in the case at bar, that the Government actually exacts and is paid duty upon the same merchandise twice over.

Upon the theory that the drainage is simply water and that consequently all the value which was in the sugar when exported still remains there (Case 2689, fol. 68), duty is exacted of the importer upon the whole quantity of sugar originally laden on board, although a large part of it had drained away into the bilge in the course of the voyage. Yet this very drainage, "too fine an article to throw away," "sometimes so thick as to classify as sugar" (Case 2676, fol. 104), is entered at the Custom House by the captains of the vessels and duty paid on it a second time *(Id.*, fol. 105*)!*

The foregoing, together with those stated in the petition itself, are the grounds upon which the petitioner asks this Honorable Court to bring this case before it for review. The grounds upon which the petitioner expects that if this Court shall review the case, it will determine the Courts below to have been in error, are likewise stated in the petition and in the briefs below, herewith submitted, and are not here reiterated.

Respectfully submitted,

JNO. E. PARSONS,
Of Counsel for Petitioner, the American
Sugar Refining Company.

Nos. 225 and 236.
Brf. of Closson & Parsons for Appt.

Office Supreme Court U.S.
FILED
MAR 28 1901
JAMES H. MCKENNEY
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Mar. 28, 1901.

Nos. 225 and 236.

THE AMERICAN SUGAR REFINING COMPANY,
Appellant,

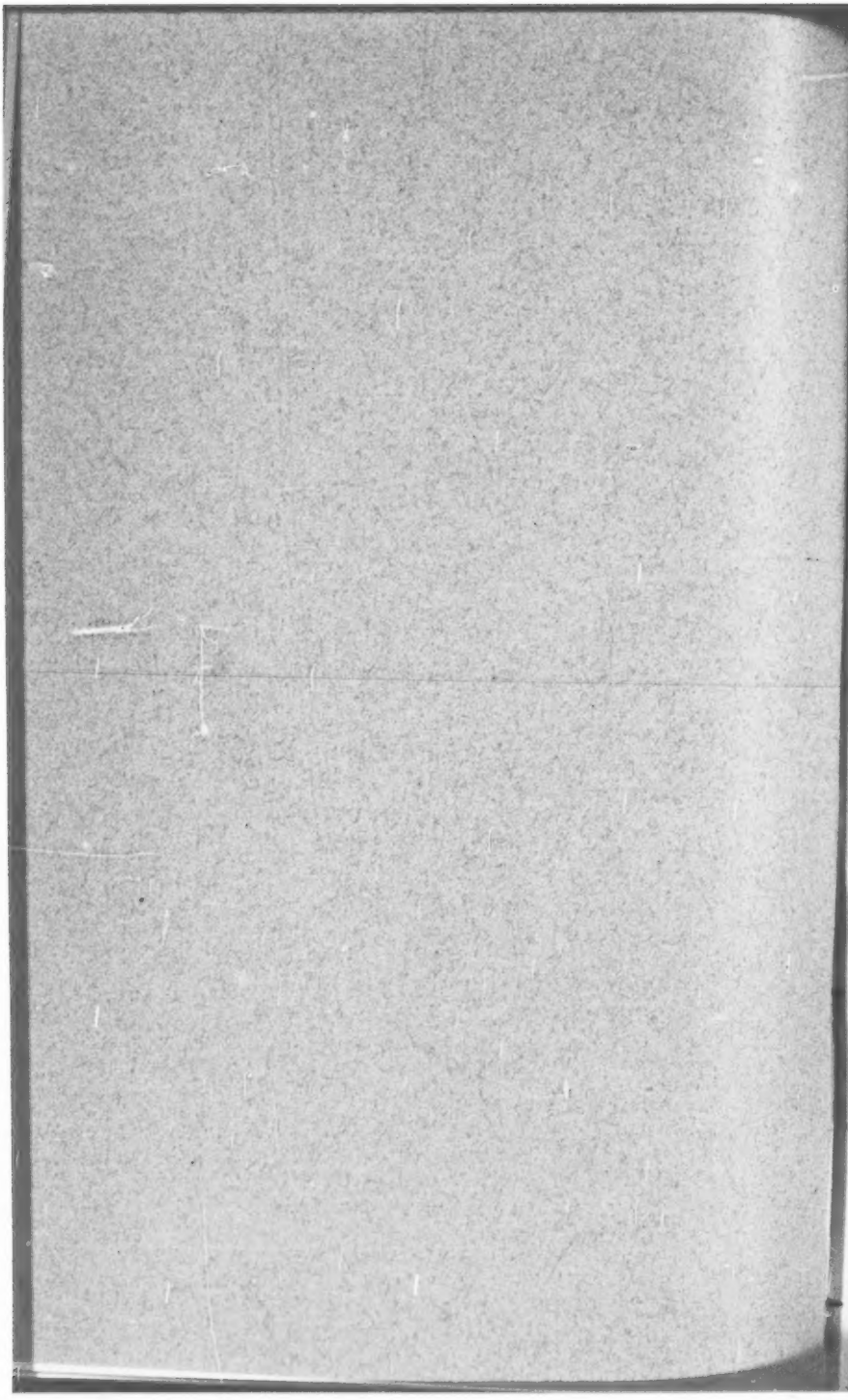
vs.

THE UNITED STATES,
Respondent.

BRIEF FOR APPELLANT.

H. B. CLOSSON,
JNO. E. PARSONS,
Of Counsel for Appellant.

C. G. Burgoyne, Walker and Centre Streets, N. Y.



In the Supreme Court of the United States.

THE AMERICAN SUGAR REFINING COMPANY, Appellant, vs. THE UNITED STATES, Respondent.	No. 225.
SAME vs. SAME.	No. 236.

Certiorari to the Circuit Court of Appeals for the Second Circuit to review a decree of that Court affirming a decree of the Circuit Court affirming the decision of the Board of General Appraisers assessing duties upon certain cargoes of sugar imported in March, 1897, from Brazil, on the vessels "John Swan," "Richmond," "Bellaura" and "Cuvier."

Statement of the Case.

The rate and amount of duty to be paid on the sugar in question in these cases were fixed by Section 182½ of the Tariff Act of 1894, as follows:

"182½. There shall be levied, collected and paid on all sugars and on all tank bottoms, syrups of cane juice or of beet juice, melada, concentrated melada, concrete and concentrated molasses, a duty of forty per cent. *ad valorem*."

The method of determining this "value" was prescribed by statute as follows:

Customs Administrative Act of 1890. "SEC. 19. That whenever imported merchandise is subject to an *ad valorem* rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities, *at the time of exportation to the United States, in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States*, or consigned to the United States for sale, including the value of all cartons, cases, crates, boxes, sacks and coverings of any kind, and all other costs, charges and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, and if there be used for covering or holding imported merchandise, whether dutiable or free, any unusual article or form designed for use otherwise than in the *bona fide* transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subject if separately imported. That the words 'value' or 'actual market value' whenever used in this act or in any law relating to the appraisement of imported merchandise shall be construed to mean the actual market value or wholesale price as defined in this section."

Revised Statutes, Sec. 2904 (not repealed. See Customs Ad. Act. of 1890, Sec. 29):

"When the duty upon any imports shall be subject to be levied upon the true market value of such imports in the principal markets of the country from whence the importation has been made, or at the port of exportation, the duty shall be estimated and collected upon the value *on the day of actual shipment* whenever a bill of lading shall be presented showing the date of shipment and which shall be certified by a certificate of the United States consul, commercial agent or other legally authorized deputy."

In each of these importations the Appraiser ascertained that the market value of the sugar when shipped

was a certain amount per hundred weight. To this valuation, in each case, he made an addition of a certain further amount per hundred weight to represent a supposed increase of its value during the voyage owing to drainage. Duty was accordingly assessed at forty per cent., not of the value of the sugar per hundred weight "at the time of exportation to the United "States," "on the day of actual shipment," and "in the "condition in which such merchandise is there bought "and sold for exportation to the United States," but at forty per cent. of its greater value per hundred weight in its condition when landed.

In three of these shipments these facts appear from the report of the Appraiser to the Collector.

"The value of sugar per unit of quantity advanced from 6s 8d cwt. 87° (in the case of the 'Bellaura' 7s 2d cwt. 86°), the market value when shipped, to 7s 9d cwt. 87° (in the case of the 'Bellaura,' 7s 11½d cwt. 86°), in the condition landed owing to its increased value due to drainage on the voyage of importation" (Case 225, fol. 30).

In the case of the "Cuvier" the fact of a similar addition to the market value when shipped appears from the testimony (Case 236, fol. 22).

This assessment of duties on a sum greater than the market value of the merchandise when shipped, upon its face a direct violation of the statute, it is attempted to justify by evidence of peculiar properties of the sugar, supposed to require this peculiar procedure to prevent it from escaping the duties which it ought "equitably" to bear. There is no conflict in this evidence. It is substantially as follows:

Brazil sugars of the kind in question "at the time of exportation to the United States," and "in the condition in which such merchandise is there bought and sold for exportation to the United States," usually contain from five to eight or nine per cent. of water (Case No. 236, fol. 28). Sugar containing these percentages of water will during the voyage from Brazil to the port

of New York lose in weight by drainage about double the percentage of water contained in it—*i. e.*, from ten to sixteen per cent. (Case No. 2689, fol. 81; Case No. 2676, fol. 101). As the amount of drainage is thus about double the percentage of moisture, it necessarily follows, and is proved as a fact, that this drainage consists not of water, but of molasses, sometimes so thick as to classify as sugar (Case No. 2676, fols. 104, 105; Case No. 2689, fol. 75). Drainage of this kind "is too fine an article to throw away," and there are dealers in it in this city who regularly buy it from the captains of vessels, invoice it, and pay duty on it (Case No. 236, fol. 27).

Owing to this loss in weight and the uncertainty as to its amount, it has become customary to insert in the contract of sale a guaranty that the loss shall be a certain percentage estimated by experts as the probable drainage of the particular cargo. If the loss is less than the stipulated percentage, the seller receives an additional payment in proportion; if it is greater he makes a corresponding allowance from the purchase price (Case No. 236, fols. 21–27).

Upon these facts, or rather upon such of them as appeared from the record, the importers in each case duly protested and appealed upon the ground that under the proper construction of the statute, the rate and amount of duty chargeable upon the sugar in question could be only forty per centum of its market value when shipped, and that duty upon "its increased value due to drainage on the voyage of importation" was illegally exacted.

The Board of General Appraisers overruled the protest without opinion. The importers thereupon, under Section 15 of the Customs Administrative Act, applied to the Circuit Court for a review of the questions of law and fact involved in the decision.

In the Circuit Court the further evidence was taken from which the facts already stated appeared without contradiction. Nevertheless, the learned Justice who

presided at the hearing in that Court, be it stated with the utmost respect, radically misapprehended this evidence. The errors of fact into which he fell appear from the following italicized passages of his opinion:

"Owing to drainage there are less pounds of sugar on arrival here than when the ship left Brazil, *but the cargo is actually worth as much as when it started.* It appears, therefore, that, if the sugar had been kept for the same length of time in Brazil, *the same loss in weight by drainage and increase in value per pound would have taken place there*, and *the value of the cargo as a whole would not have been affected thereby*" (Case, 225, fol. 39; Case, 236, fol. 31).

1. It is not the fact that "the cargo is actually worth as much [on arrival] as when it started." The loss during the voyage is due almost wholly, not to evaporation, which would be harmless, but to drainage (Case, 225, fol. 35; Case, 236, fol. 25). The cargo is, therefore, necessarily worth less, by exactly the amount of saccharine matter contained in the drainage. This is so great that, according to the uncontradicted evidence, this drainage, instead of being merely bilge water, is molasses, sometimes so thick as to "classify as sugar"—"too fine an article to throw away"—regularly dealt in; duly invoiced at the Custom House, and the duties upon it duly paid (Case 225, fol. 35).

2. It is not the fact that, "if the sugar had been kept "for the same length of time in Brazil, the same loss "in weight by drainage and increase of value per "pound would have taken place there."

The only express evidence on this point is that the sugars "will drain anywhere (Case 225, fol. 35) to some extent." The subject, however, calls for no evidence but the application of elementary principles of physical science. The drainage is caused by the presence of water in excess of the percentage which can be held by the sugar in its solid state. As sugar is ordinarily stored in ware-

houses, a very large proportion of this water escapes by evaporation harmlessly. Under such circumstances it is only so much of the excess of moisture as is unable to escape by evaporation, which, in filtering downwards through the sugar, dissolves some part of it before passing out as drainage. In the closely packed and confined hold of a vessel, on the contrary, the dissipation of the moisture by the harmless process of evaporation is almost wholly prevented (Case 225, fol. 35). Substantially all the water contained in the sugar must filter downwards through tier upon tier of bags to the bottom, taking toll of each specific bag through which it passes, until the saturation point is reached and it passes into the bilge as molasses, so thick often as to "classify as sugar."

3. It is not the fact that "the value of the cargo as "a whole would not have been affected thereby" (to wit, by the drainage). This is a mere corollary from the foregoing. The residue left after the drainage is undoubtedly pound for pound of higher saccharine percentage and therefore value than when shipped. But the total increase in value thus obtained necessarily falls short of compensating for the loss by drainage, by exactly the saccharine matter lost in the drainage.

These are the indisputable errors into which the Circuit Court fell in ascertaining the facts upon which its decision was to proceed. In determining the law applicable to these facts, we are bound, with great respect, to submit that it fell into errors equally indisputable. The learned Judge presiding apparently overlooked entirely the provisions of Section 19 of the Customs Administrative Act and Section 2904 of the Revised Statutes, prescribing that the duty shall be collected "upon the "value upon the day of actual shipment," "at the time "of exportation to the United States," "in the condi- "tion in which such merchandise is there bought and "sold for exportation to the United States." These sec-

tions are nowhere referred to in his opinion. Instead, he cites as the law applicable to the case only the provisions of Section 10 of the Customs Administrative Act as follows:

"That it shall be the duty of the appraisers of the United States to ascertain, estimate and appraise the actual market value and wholesale price of the merchandise at the time of exportation to the United States in the principal markets of the country whence the same has been imported" (Case, 225, fol. 38; Case, 236, fol. 31).

Under this section of the statute the learned Circuit Judge upheld what he understood to be the contention of the counsel for the Government, stated as follows:

"Counsel for the government contends that the language of section 10 refers to the value in the foreign market of said merchandise *in the condition in which it arrives at the port of New York*" (Case, 225, fol. 38; Case, 236, fol. 31).

He found, therefore, that the appraisers had not committed any "substantial error by their mode of "ascertaining the market value in Brazil of the sugar "*on its arrival here;*" and that their decision should be affirmed (Case, 225, fol. 39; Case, 236, fol. 32).

In the Circuit Court of Appeals the judgment of the Circuit Court was affirmed, but on different grounds. Although that Court also apparently overlooked the provisions of Section 2904 of the Revised Statutes, requiring that the duty should be collected "upon the value upon the day of actual shipment," it did concede that the case was governed not by Section 10 but by Section 19 of the Customs Administrative Act, and that therefore the value to be assessed must be that "at the time of exportation," "in the condition in which such mer-"chandise is bought and sold for exportation to the "United States." The Court also conceded that "it

s true that the word 'condition' (as used in Section 19) is broad enough to include any state or situation" (Case, 225, fol. 56; Case 236, fol. 49). The Court held, however, that this word "condition," "as used in "Section 19, (it) was not intended to limit the ap- "praiser to a condition which existed at the time of "the purchase *(sic,* for 'shipment'*)* but was immedi- "ately to become altered and changed until a new "condition in value was reached" (Case 225, fol. 56; Case, 236, fol. 49); and that "the construction of the "statute which would compel an ascertainment of "value as the sugar was bought in Brazil when wet, "*though justified by the language of the statute if liter-* "*ally construed,* is not sound" (Case 225, fol. 55; Case 236, fol. 48). "The loss in weight and the increase in "value are necessary incidents to the sugar of Brazil, "and it is dry sugar when it reaches New York. In "this state of facts it is incumbent upon the appraiser "*to ascertain the value of similar dry sugar in the mar-* "*kets of Brazil,* and not to be limited to its invoice "price or market value, when wet" (Case, 225, fol. 56; Case 236, fol. 49).

Upon the rendition of this judgment of the Circuit Court of Appeals, the importers in March, 1900, applied to this Court for a writ of *certiorari* to bring the cases before this Court for review. The motion was granted, in June, 1900.

Assignment of Errors.

1. Duty was assessed not only upon the actual value of the merchandise as bought and sold in usual wholesale quantities at the time of exportation to the United States in the principal markets of the country from whence imported, but also upon a supposed increase in the value of the merchandise over that market value upon the voyage of importation.

2. Duty was assessed upon the supposed market value of the merchandise in the condition in which it arrived at the United States and not in the condition in which the merchandise was bought and sold for exportation to the United States in the principal markets of the country whence imported.

3. Duty was assessed upon the assumption that although owing to drainage there were in each case less pounds of sugar delivered at New York than were laden on board in Brazil, the cargo was actually worth in each case as much as when it started.

4. Duty was assessed upon the assumption that the value of the cargoes as a whole was not affected by the drainage which took place during the voyage.

5. The Court below held that the legality of the appraisal depends simply upon the meaning of the following words of Section 19 of the Customs Administrative Act—to wit, " in the condition in which the " merchandise is bought for exportation."

6. The Court below held that the literal construction of the statute compels an ascertainment of the value of the sugar in the condition in which it was bought in Brazil, but that such literal construction of the statute is not sound.

7. The Court below held that the word "condition," as used in the said section of the statute, is not intended to limit the appraiser to a condition which existed at the time of the purchase, but was immediately to become altered and changed until a new condition and value was reached.

8. The Court below held that it is the duty of the appraiser to ascertain the value in the markets of Brazil of sugar in the condition in which it reached New York.

Points of Law and of Fact.

First Point. The question involved in these cases is one of the construction of the law and the facts respecting the classification of imported merchandise, and the rate of duty imposed on it under such classification. It was, therefore, properly presented under the provision of Section 14 of the act by protest and appeal to the Board of General Appraisers in the first place, and thereafter under the provisions of Section 15, by the application to the Circuit Court for a review of the questions of law and fact involved in the decision; and is now regularly before this Court for review.

In three of the cases it appears from the express statement of the Appraiser's report that he ascertained "the market value when shipped of the sugar to be a certain amount" per unit of quantity; and "advanced" this to a certain greater amount to obtain its value "in the condition landed, owing to its increased value due to drainage on the voyage of importation." In the *Cuvier* case the same thing appears from the evidence taken. The cases are, therefore, brought directly within the principle of the following decision:

U. S. vs. Passavant, 169 U. S., 16:

BY THE COURT: "Whether the dutiable value in this case was erroneously increased by the unauthorized addition of an independent item to the market value, as asserted by the importers, was a question of law and properly carried to the Board of General Appraisers by protest and appeal."

U. S. vs. Herrman, 91 Fed. Rep., 116:

BY THE COURT: "If the collector, in deciding the dutiable value of the importations in controversy, proceeded upon an appraisement by which that value was found by adding a commission to the wholesale price

or market value of the merchandise in the foreign market at the time of exportation, that decision was reviewable by the board of general appraisers under Section 14 of the Customs Administrative Act, and the decision of the board affirming the collector's decision was properly reversed by the Circuit Court because such a decision would have proceeded upon an improper construction of the law."

Second Point. The essential feature of the taxation of a civilized government is that it is absolutely fixed, uniform, calculable in advance; never imposed *ex post facto*.

In a business where the success of the manufacturer depends upon the fractions of a cent by which he can diminish the cost of his manufactured product, it is indispensable that he shall be able to reckon beforehand with proportionate exactness the various factors of this cost. Not the least important of these is the amount of duty which the Government will exact upon the imported raw material. Any construction of a tariff law which makes such a computation impossible; and permits an appraiser to depart from the plain letter of the law upon which the merchant has reckoned, for the sake of achieving what the appraiser or his superior may consider "equitable" results, or because "he does not think the importer should gain" by adapting his importations to the tariff imposed upon them, leaves the merchant to conduct not a business, but a lottery.

Merritt vs. Welsh, 104 U. S., 694, 702:

BY THE COURT: "If the quantity of saccharine matter in sugar, or its state of advancement from the raw state to a condition of refinement, is desirable as a dutiable standard, let it be so declared by the laws, and then the merchant will know on what he has to depend. Uncertainty and ambiguity are the bane of commerce. Discretion in the custom-house officer should be limited as strictly as possible. It has been

said with much truth, ' where law ends, tyranny begins.' "

Third Point. For the reason stated in the last point, it is a necessary presumption that in the Customs Administrative Act Congress has adopted a uniform and unvarying method of fixing the value of imported merchandise upon which an *ad valorem* duty is to be assessed ; and that this method is to be adhered to in every case, without regard to the greater or less amount of revenue produced by it in the particular case ; in order that the importer may in each case himself calculate in advance the amount of duty which will be exacted upon the merchandise he buys for importation.

Fourth Point. No method of fixing the value of merchandise, not only itself of fluctuating market value, but subject to change in its physical condition independently affecting its value, can meet these requirements, which does not prescribe both the time and the condition as of which the value shall be taken.

Fifth Point. There can be no doubt as to the time as of which Congress has prescribed that the value of imported merchandise shall be determined. It is " the day of actual shipment," " the time of exportation to the United States " (Revised Statutes, Sec. 2904, Customs Administrative Act, Sec. 19, *supra*).

Sixth Point. In the absence of clear evidence in the Act of a contrary intention, the requirement that the value of the merchandise shall be taken as of " the

day of actual shipment," of itself involves the requirement that the value shall be taken of it in its then actual physical condition as well.

To ascertain what would have been the value of merchandise at the time of exportation to the United States, if it had then been in a condition which in fact it only attained some weeks later, at the time of actual importation into the United States, is not, on its face, a compliance with a statute requiring simply the ascertainment of its value " at the time of exportation to the United States."

Seventh Point. Such a procedure, on the contrary, involves the interpolation by the courts into the statute of an exception which Congress itself did not see fit to put there ; for in such case the statute actually enforced would read as follows :

" Duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities at the time of exportation to the United States in the principal markets of the country from whence imported ; *except that in the case of merchandise which is subject during the voyage of importation to a change in its condition affecting its value, duty shall be assessed upon what would have been the value as aforesaid of such merchandise at the time of exportation if it had then been in the condition in which it arrived in the United States.*"

1. It is familiar law that, unless constrained by clear evidence in the language of the statute itself of such an intention, the Courts do not insert into a general provision of a statute an exception which the Legislature has failed to express, however convinced they may be by considerations outside of the language of the statute that the Legislature, if its attention had been called to the point, would itself have inserted the exception.

Merritt vs. Welsh, 104 U. S., 694:

BY THE COURT: "Congress did not leave any room for doubt as to its meaning. It used apt terms to express it; terms free from all ambiguity and obscurity. If the test adopted fails to effect the desired object, the inconvenience or loss to the treasury need only be temporary: it can be changed at any moment. And it is better to submit to a temporary inconvenience than to set the laws all afloat by laying down a canon of construction which leaves the plain words, and seeks to spell out, or guess at, the supposed intent of the legislature contrary or supplementary to that which is clearly embodied in the words it has used."

Lake County vs. Rollins, 130 U. S., 662:

BY THE COURT: "If the words (of the Constitution) convey a definite meaning which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it."

Bate Refrigerating Co. vs. Sulzberger, 157 U. S., 1, 43:

BY THE COURT: "We have no authority to add to the clause last quoted (of the Statute) the words 'prior to his application.' To do so would be to legislate, and not to interpret and give effect to the Statute as passed by Congress."

Demarest vs. Wynkoop, 3 Johns., Chan. Rep., 129:

KENT, C. J., "The general words in the Statute must receive a general construction; and if there be no expressed exception the Court can create none."

Farmers' Loan and Trust Co. vs. Oregon Ry. Co., 24 Fed. Rep., 407:

BY THE COURT: "It is not likely that the members of the legislature in the passage of this act were moved by any desire to shift the burden of taxation in the case of a railway mortgage, from the shoulders of the debtor to those of the creditor, as they certainly

were in the cases of mortgages generally. But I know of no principle of law or rule of construction that authorizes a court to limit or set aside the plain language of an act upon any such surmise or conjecture, however probable. The act declares 'that all mortgages, etc., whereby land situate in more than one county in this state is made security for the payment of a debt, shall be void.' The language of the provision is plain and unambiguous. It speaks for itself and there is no room for construction. The legislature must be intended to mean what it has plainly said. In such a case the court is not at liberty to look elsewhere than the act for a possible or even probable, legislative intention. *(Cooley on Constitutional Limitations, 55).*"

2. This rule of construction is applicable to all statutes; and with especial force to those imposing taxes and duties. As to these, it is supplemented by this extension of it, that if the literal construction of the language used enables the importer to escape with the less tax than that which the looser and more liberal construction of it would impose, the importer is entitled to the literal interpretation.

U. S. vs. Isham, 17 Wall., 496.
Amer. Net and Twine Co. vs. Worthington, 141 U. S., 468.

Eighth Point. There is no where to be found in the act any evidence whatever that Congress intended to have read into it an exception authorizing merchandise subject to change in its physical condition affecting its value, to be valued in a condition different from that actually obtaining at the time prescribed for the ascertainment of its value.

Neither of the courts below, nor the counsel for the government, has undertaken to point out any language of the act indicating such an intention.

Ninth Point. On the contrary—and wholly apart from the effect to be given to the express requirement of the act that the value shall be that of the merchandise "in the condition in which such merchandise is there (in the country of exportation) bought and sold for exportation to the United States,"—there is apparent throughout the entire act the consistent purpose that the taxable value of imported merchandise shall be fixed immutably at its value "on the day of actual shipment" from the foreign port, in the condition in which it then subsists, provided only it shall so far survive the voyage as still to constitute "merchandise" when actually imported into this country.

1. It is undeniable that Congress contemplated the possibility of a change in the condition, and, consequently, in the value of merchandise during the voyage of importation; for there is an uncompromisingly clear provision for the case in which such a change during the voyage shall be in the direction of a deterioration in condition, and a consequent decrease in the value of the merchandise:

SECT. 23. "No allowance for damage to goods, wares and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon. But the importer thereof may, within ten days after the entry, abandon to the United States all or any portion of goods, wares and merchandise included in any invoice, and be relieved from the payment of the duties of the portion so abandoned, provided that the portion so abandoned amount to ten per centum or over of the total value or quantity of the invoice."

Thus, the importer of windowglass or pineapples, in good condition when paid for and shipped, pays duty on his merchandise at its value in that condition, although it be delivered to him at the end of the voyage, the glass in shattered and worthless fragments (U. S. vs. Bache, 59 Fed. Rep., 762), and the pine-

apples as decayed and equally worthless "slush" (Stone vs. Lawder, 101 Fed. Rep., 710).

These were hard cases in which to enforce the rule that the appraisable condition of merchandise is fixed unalterably at its condition "on the day of actual shipment"; and yet the consequent loss was well borne by the importers, if thereby was vindicated the principle that the standard of value fixed by law will be inflexibly and unswervingly applied in every case, however much its particular features may tempt to paltering with it. "Uncertainty and ambiguity," not high tariffs, "are the bane of commerce." But in view of this provision of the statute, and this rigid enforcement of it against the importer, it seems impossible to justify either in law or morals the refusal of the courts below to hold the Government with equal strictness to the same standard of value where, during the voyage of importation, the change in the condition of the merchandise has been in the direction of an improvement and consequent increase in value. The decision of the courts below has placed the Government in the position of exacting of the importer of merchandise which undergoes a change of condition, and therefore value during the voyage, that the dutiable value shall be ascertained before the change if for the worse; but after the change if it be for the better.

2. Another provision of the statute which requires the appraiser to value the sugar in the physical condition in which it existed "on the day of actual shipment," and not in the condition in which it arrived at the end of the voyage, is that which prescribes that the duty in question is to be "levied, collected and paid" on "sugar."

"Sugar" is a familiar commercial article of merchandise composed of from say seventy to ninety-nine per cent. of a chemically pure substance known as sucrose ($C_{12}H_{22}O_{11}$), various impurities, and one to eight per cent. of water.

If the duty were imposed not upon this compound known as sugar, but upon the pure sucrose which it contains, it would obviously be correct for the appraiser to ignore the percentage of water and other impurities contained in each pound of the compound at the time and place when and where he is by law required to value it, and to inquire simply as to the then value of the given quantity of sucrose. Inasmuch, however, as it is sugar and not sucrose which is subject to duty and required to be appraised, the inquiry of the appraiser must be as to the value of each pound of sugar at the time and place as of which he is required to value it. This value necessarily depends in part upon the relative percentages of the sucrose, impurities and water then contained in it. If he finds that at that time and place the percentage of water was large, and the value per pound correspondingly small, he must appraise it as he finds it then to have consisted, with the different percentages of sucrose, impurities and water as they then were. He has no more right to eliminate from his consideration the water it then contained simply because at a subsequent stage of its history, with which he has no proper concern, some or all of this water was, in whatever way, eliminated, than he has to disregard every then constituent of it except the sucrose and appraise that only. Such a course would be correct only if the duty were imposed upon sucrose. The method which would be correct in that case, if the duty were imposed upon sucrose, must necessarily be incorrect when the duty is imposed upon sugar—*i. e.*, both upon sucrose, impurities and water.

This rule of law the Government would find no difficulty in admitting, if it were the importer who was seeking to eliminate the water from the merchandise to be appraised and taxed. There cannot be one rule for the importer and another for the Government on the same subject. What the rule is upon this subject has already been settled by this Court.

Ernshaw vs. Cadwalader, 145 U. S., 247, 259:

"Under the provisions of the tariff act iron ore was charged with a duty of 75 cents per ton landed. The plaintiff gave evidence tending to show that a considerable percentage of the weight on which the duty had been assessed by the collector was made up of water mechanically present in the ore; that the amount of such water which iron ore contained varied according to circumstances from practically nothing up to 25 per cent.; and that practically all the moisture would dry out in the sun or would be driven out by heating the ore to the boiling point of water. The importer contended, therefore, that he could be obliged to pay duty only upon the iron ore itself, and not upon the percentage of water mechanically contained in it."

By the Court: "It appeared by the evidence that dried ore was an article unknown to commerce or trade; * * * That water mechanically mixed, is one of the natural and constant constituents of the iron ore of commerce, both domestic and foreign; and that there is no warrant for the conclusion that the iron ore of the statute is limited to dry ore, or ore with such mechanically mixed water excluded.

"Held, that it was the duty of the collector to assess the duty upon the ore in its condition at the time as of which he was required to appraise it, including whatever percentage of water it then contained."

3. Still another provision of the statute which, like the last, requires the appraiser to value the sugar in the physical condition in which it existed on the day of actual shipment, and not in the condition in which it arrived at the end of the voyage, is that which prescribes that a duty is to be imposed only upon "articles imported."

It is only so much of the sugar as actually reaches the United States and is landed there—to wit, in the cases at bar about eighty-four per cent. of the amount exported, that the appraiser can appraise.

If sixteen out of every hundred pounds of "sugar" shipped has as sugar disappeared during the voyage, being lost in the bilge and abandoned by the importer, it has thereby escaped the jurisdiction of the appraiser.

He cannot tax it as sugar, because as sugar it no longer exists. To seek to pursue each or any one of its former constituent elements, whether sucrose, water or impurities, into other merchandise and to tax it there, is simply an indirect way of doing what cannot be done directly.

Marriott vs. Brune, 9 Howard, 619 :

" Under the Act of July 30, 1846, imported sugar was taxed at 30% *ad valorem*. The sugar in question was imported in loose hogsheads from Puerto Rico and lost by drainage during the voyage about five per cent. of the invoice weight. The collector had assessed duty upon the invoice weight, refusing to make any allowance for leakage and drainage. Held error.

HEAD NOTE. " The true construction of this law is that the duty should be charged only upon that quantity of sugar and molasses which arrives in our ports, and not upon the quantity which appears upon the invoice to have been shipped."

By the Court : " The general principle applicable to such a case would seem to be, that revenue should be collected only from the quantity or weight which arrives here. That is, what is *imported*, for nothing is imported till it comes within the limits of a port. * * * When the duty was specific on this article, being a certain rate per pound before the act of 1846, it could of course extend to no larger number of pounds than was actually entered. The change in the law has been merely in the rate and form of the duty, and not in the quantity on which it should be assessed. On looking a little further into the principles of the case, it will be seen that a deduction must be made from the quantity shipped abroad whenever it does not at all reach the United States, or we shall in truth assess here what does not exist here."

Shaw vs. Dix, 72 Fed Rep., 166 :

The Collector exacted duties on the whole number of cocoanuts specified in the invoice, deciding that Section 23 of the Act of June 10th, 1890, was applicable, and that under the ruling in U. S. vs. Bache, 59 Fed. Rep., 762, the shortage was a damage to the merchandise for which no allowance could be made, as it did

not amount in any case to ten per cent. of the total quantity of the invoice, and there could consequently be no abandonment to the United States as required by that section. The importers duly protested, claiming that they asked for no allowance for damage to the cocoanuts which actually arrived, and that they desired to pay for all cocoanuts discharged from the vessel—whether sound or damaged--but that the mass of matter, which remained after discharging the cargo, represented cocoanuts which, having rotted or been broken up on the voyage, ceased to be merchandise of any kind.

By the Court: "It is quite true that the allowance for damage to imported goods is expressly regulated by section 23 of the act of June 10, 1890; but it is true now, as it was before that act was passed, that duty is not to be assessed on an article which does not arrive in this country" (Marriott vs. Brune, 9 Howard, 619). * * *

"In U. S. vs. Bache, 59 Fed. Rep., 762, the facts presented raised a very different issue. The importation was glass in cases or packages, and a considerable breakage of glass in the cases occurred during the voyage. The cases all arrived. The contents were not destroyed but were damaged. It was clearly a case within the language of section 23."

4. If the improvement in the quality of the sugar during the voyage were due to some molecular or chemical change, not involving the supposed absorption of some of the valuable constituent elements of other adjacent cargo, it will doubtless be admitted that the consequent increase over the value at the time of exportation could not be considered by the appraiser. The fact that in the case at bar the increase is due to such absorption of valuable elements from other merchandise, is but an added reason for excluding it from consideration. The gain in value of the one is the loss in value of the other, and the two may as well belong to different owners as to one. But by the express provisions of Section 23 *(supra)* no allowance can be made for the loss in value to the one, and it must consequently be assessed as still itself contain-

ing the value in fact absorbed by the other. To likewise assess this transferred value as a part of the other, is therefore obviously to assess duty upon it twice; and this is precisely what has in fact happened in the case at bar. The Circuit Court affirmed the action of the Board of Appraisers on the express ground that "owing to drainage there are less pounds of sugar on "arrival here than when the ship left Brazil, but *the "cargo is actually worth as much as when it started;* "* * * the value of the cargo as a whole would "not have been affected thereby" (Case 225, fol. 39; Case 236, fol. 32).

Yet this very "drainage"—"too fine an article to "throw away," sometimes so thick as to classify as "sugar"—is entered at the Custom House by the captains of the vessels and duty paid on it a second time (Case 225, fol. 35).

5. It is a wholly immaterial fact that the probable loss during the voyage of a given percentage of the sugar shipped is considered by the purchaser and seller when the contract of sale is made, and is in a way provided for either by discount from the current market price or by a guarantee that the loss shall not exceed a fixed percentage or both.

U. S. vs. Southmayd, 9 Howard, 637:

This case involved the same question as *Marriott vs. Brune, supra*, with the additional fact in evidence "that the purchaser abroad takes into consideration the probable loss (by drainage during the voyage to the United States) in fixing the price to be paid."

By the Court: "It is argued that the price abroad is, therefore, lower in this proportion on this account, and, hence, that no deduction should be made here for what is taken into consideration there. But the first answer to this position is that, if the price is fixed too low there or lower than it should be on the quantity likely to be saved and to arrive here, it is the duty of the appraisers to raise the price, and it must be presumed they would raise it if required by all the facts.

[In the cases at bar the appraisers did without protest from the importers exactly this. The "6s. 8d. Avt.," which they found to be "the market value when shipped," was obtained by them precisely by "raising the price, a less amount than the "6s. 8d. Avt.," to that figure as the true "market value when shipped." It is not of this legitimate "raising of the price" to obtain the true market value, of which the importers here complain; but of the further addition to the market value thus raised, of six pence per cent., to cover the increase in value during the voyage.] In the next place, this calculation by the merchant abroad in fixing the price is a mere speculative or commercial one, connected with the profit and loss, and not with a view to the duties to be assessed here. Again, the duty here is regulated by law, and not by any estimates of such a character by men of business, and by law it is imposed on the quantity entered here, and not the quantity shipped abroad, and on the true price abroad as estimated by the appraisers, and not necessarily as estimated by the owners. Again, if the owner was benefited by this drainage in the improved quality of the sugars or molasses left, and to the extent of the loss in weight, there might be some equity in considering him liable for the weight abroad. But, as explained in the preceding case, such does not seem to be the current of the evidence. There are cases likewise of imports here made by the producers of the article abroad. In those this supposed element in the price to prevent the justice of a reduction in the weight here could hardly exist, as there is no sale abroad, and this shows the incongruity and want of applicability of such a fact to constitute a rule in any case for estimating *ad valorem* duties."

Tenth Point. The Circuit Court of Appeals considered that the question of the legality of the appraisal in the case at bar "depends upon the meaning of the words 'in the condition in which the merchandise is bought for exportation'" (Case, 225, fol. 55; Case, 236, fol. 48). On the contrary, the case has been so far argued as if there were no such words in the statute. The words "in the condition in which such

" merchandise is there bought and sold for exporta-
" tion to the United States " are, however, in the statute. They of themselves remove any possible doubt as to whether Congress, in requiring imported merchandise to be valued on a certain day, intended it to be valued in its then condition, or in a condition which it never attained until the end of the voyage of exportation.

The Circuit Court of Appeals escaped this conclusion only by holding that the word " condition," " although broad enough to include any state or situa-
" tion," and although this interpretation of it is " jus-
" tified by the language of the statute if literally con-
" strued," is here used to mean simply " the state or
" condition of the preparedness of the merchandise for
" shipment when sold."

It is really immaterial whether this construction could, apart from the context, be justified or not, because the other provisions of the statute of themselves require the appraiser to value the merchandise in the condition obtaining at the time at which he is required to ascertain its value.

The construction is, however, *per se* indefensible :

1. It confessedly ignores the "literal" meaning of the act, in order to impose a heavier tax upon the importer than he would otherwise have to bear. This is never permitted.

U. S. vs. Isham, supra.
Amer. Net & Twine Co., supra.

2. It requires the Court, in violation of principles already considered, to interpolate into the act an exception to the general language employed by Congress, as follows :

" The duty shall be assessed upon the actual market value * * * in the condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States

for sale, *excepting such physical conditions as will alter during the voyage to the United States; and, as to such, in the condition in which the merchandise reaches the United States.*"

3. The construction is in effect, that the only features of the merchandise included by the word "condition," as used in the statute, are the artificial preparations for shipment which it has undergone, "whether packed "or unpacked, specially prepared for a voyage or un- "prepared, and the expense incident to placing the "merchandise into condition for shipment."

Such a construction of the act does violence to the language of the act itself. The language of it is that the merchandise shall be valued "in the condition in "which such merchandise is there bought and sold for "exportation to the United States, or consigned to the "United States for sale, *including* the value of all "cartons, cases, crates, boxes, sacks and coverings of "any kind, and all other costs, charges and expenses "incident to placing the merchandise in condition "packed ready for shipment to the United States."

"Including" is not synonymous with "*videlicet.*" If the "condition" in which the merchandise is to be valued "includes" these things, as the statute says, it is because it is not merely the equivalent of them, but includes other things as well; to wit, that physical state or condition of the merchandise, which, admittedly, "it is broad enough to include."

(4) For the distinction attempted to be drawn by the Circuit Court of Appeals—to wit, between a condition of sufficient permanency to outlast the voyage and a condition subject to change during the voyage—there is confessedly no warrant or suggestion in the language of the act itself. On the contrary, the clear language of Section 23, excluding from the consideration of the appraiser any change in the physical condition of the merchandise when for the worse, expressly forbids it. A cargo of oranges or bananas, no

less than one of Brazil sugars, is when shipped in a condition "immediately to become altered and "changed until a new condition and value is "reached." This change in condition and value is a "necessary incident" to green fruit no less than to green sugars. Whether it tends to increase or diminish the value of the fruit depends simply upon the extent of the change at the termination of the voyage. That in turn may depend upon whether the shipment is by steam or sailing vessel. According to the Circuit Court of Appeals, if the fruit is overripe when it reaches New York, the appraiser must inquire the value at the port of shipment, not of a cargo of the fruit in the condition in which it was in fact shipped, but of a cargo of overripe fruit, and assess the duty upon the result, thus flatly violating the prohibitions of Section 23.

Eleventh Point. In the Circuit Court the case was decided in favor of the Government because the learned Circuit Judge did not "think the importer should [*i. e.*, ought to] gain" by buying sugars which increase rather than decrease in value during the voyage, and so escaping the duty which he would have had to pay if their value had been as great when shipped as when landed. The Court of Appeals, however, admitted that the question is solely of "the "legality of the appraisal, not of its accuracy or "equity." And in this court it certainly is still less necessary for the importer to argue, that to the conditions presented by the sugar tariff adopted by Congress he had the right and was indeed invited to adjust his business; or that, if under the Tariff Act of 1894, he found it to be to his advantage thereafter to import a larger percentage of green or wet sugars and a smaller percentage of dry or cured sugars than theretofore, the opportunity to lessen thereby the cost to himself of his raw material was a wholly legitimate

one by which he not only "should gain," but must gain, at the peril of being crowded out of business by less Quixotic competitors.

Seeberger vs. Farwell, 139 U. S., 610.
Merritt vs. Welsh, 104 U. S., 694.

Doubtless no fixed standard can be adopted to which the importer will not be able in some cases, at any rate, to adapt his business more successfully than was anticipated by Congress, or is pleasing to the customs officials, or to the courts. Nevertheless there is every reason to suppose that Congress was right in anticipating that the standard adopted—to wit, the value of the merchandise when shipped from the country of exportation, in the condition when shipped—would, in the vast majority of cases, work to the advantage of the Government. A long sea voyage is not commonly regarded as likely to enhance the value of articles of trade. Green sugars and madeiras are, perhaps, the only exceptions. It was with the wisdom of experience that Congress determined in taxing imported merchandise to take its value before rather than after it had been subjected to the perils of a sea voyage. It is, on the whole, for the interest of the Government itself that the standard which Congress has intelligently adopted shall be uniformly and rigorously adhered to in every case.

Last Point. The judgment should be reversed, and the case remanded with instructions to reverse the judgment of the Circuit Court, and to direct an assessment of the duty only upon the market value of the sugar when shipped, in the condition in which it was shipped.

H. B. Closson,
Jno. E. Parsons
Of Counsel for American Sugar Refining Company.

No. 559

Brf. of Atty. Gen'l

for Respondent.

Filed Mar. 23, 1900.

SUPREME COURT U. S.
FILED
MAR 23 1900
JAMES H. McKENNEY
Richard Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE AMERICAN SUGAR REFINING Company, petitioner, v. THE UNITED STATES, RESPONDENT. } No. 559.

ON PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE AMERICAN SUGAR REFINING Company, petitioner, v. THE UNITED STATES, RESPONDENT. } No. 559.

ON PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION.

The United States respectfully submits the following points in opposition to this application:

I.

The opinions of the circuit court (Record, p. 30) and of the circuit court of appeals (p. 45) are conclusive on the merits. All aspects of the question are carefully considered, and it is plain therefrom that no legal or equitable claim can be maintained by the importers.

II.

The importers have pursued all their remedies under the customs administrative act. After the usual appraisement they demanded a reappraisement by a general appraiser and a further reappraisement by a board of three general appraisers (pp. 10, 18a). Thereupon, the original appraisement of market value and dutiable value being twice affirmed, the Board of General Appraisers properly overruled the protest, which was in reality against the valuation only (pp. 13, 1–4), and the decision in both appellate courts waives the point of jurisdiction and deliberately determines the case against the importers upon the merits of the question. Certainly under these circumstances the case should be regarded as final in the circuit court of appeals under section 6 of the act of March 3, 1891, especially since there are no conflicting decisions.

III.

The record evidence (pp. 19, 21) and the opinion of the circuit court (p. 32) touch upon the finality of the appraisement. This is in reality the only question involved, and the petition is the last step in an effort to bring the question of value before the courts, notwithstanding the plain provisions of section 13 of the customs administrative act, making the decision on final reappraisement of the board of three general appraisers "conclusive as to the dutiable value of such merchandise against all parties interested therein."

The case of *Auffmordt* v. *Hedden* (137 U. S., 310) carefully reviewed the meaning and intent of the law as

to appraisements prior to the customs administrative act, and held that the valuation of merchandise made by the appraisers is, in the absence of fraud, conclusive on the importer, and that section 2930 of the Revised Statutes was not unconstitutional in making the decision of the appraisers final. And the case of *Passavant* v. *United States* (148 U. S., 214), reviewing many authorities, holds as follows (p. 220):

> The provisions of the customs administrative act of June 10, 1890, as to the finality and conclusiveness of the decision of the Board of General Appraisers as to the valuation of imported merchandise, when that question has been regularly submitted to and examined by them, is expressed in clearer and more emphatic terms than in former statutes. The language is so explicit as to leave no room for construction. In the tariff legislation of the Government, Congress has generally adopted means and methods for a speedy and equitable adjustment of the question as to the market value of imported articles, without allowing an appeal to the courts to review the decision reached. If dissatisfied importers, after exhausting the remedies provided by the statute to ascertain and determine the fair dutiable value of imported merchandise, could apply to the courts to have a review of that subject, the prompt and regular collection of the Government's revenues would be seriously obstructed and interfered with.

Does the language of the decision in the other *Passavant Case* (169 U. S., 16), holding that an appraisement may be impeached "where the appraiser or collector has proceeded on a wrong principle contrary to law, or has transcended the powers conferred by statute," withdraw the present case from the general rule?

It is argued by petitioner, in effect, that this being a purely legal question concerning the effect to be given to section 19 of the customs administrative act (as to which see the opinion of the circuit court of appeals), and the question being of wide importance and application, a valid reason for review by the courts of the action of the appraising officers, and by this court as the ultimate court of appeal, is presented, notwithstanding the statutory finality of the appraisement as made by the regular officials. But there is nothing in the customs administrative act to suggest that the appraisement is only final and conclusive when there is not in the case a purely legal question of such far-reaching consequences as the present one seems to the importers. It may be suggested that the consequences as to merchandise other than sugar may be left to the importers of such merchandise.

IV.

In the petition (p. 5) the importers state that upon the interpretation of this statute payments of large amounts of money depend. I am advised by the Treasury Department that the amount involved in this suit and pending protests is approximately $70,000. An authoritative and final decision of the question having now been reached, and the Treasury Department having already applied the rule therein announced (and continuing, of course, so to do), both to such merchandise as is here involved and to other merchandise presenting the same question, it is not necessary to assume that the amount of money involved will be increased as other cargoes come in, because if

the court deny this application, the rule of practice has been fixed and protests and endeavors to review will be fruitless; and therefore the duties already determined to be legal will be promptly paid, and the rule of valuation and assessment, applied uniformly and for a long time, will necessarily be accepted. Nor is it necessary to assume that the courts of other circuits may not follow the action of the courts of the second circuit. Conflicting decisions are not to be anticipated. Therefore, as the matter stands, there is no doubt at all as to what the rule of law and the rule of practice is, and all importers of such merchandise, or of other merchandise respecting which this question may be pertinent, will not be uncertain as to the rule of appraisement. Indeed, the rule has not been doubtful in the past, for in Syn. Dec., 9305, and in earlier decisions, it was applied and has been maintained ever since (S. 10661). Nor will they be ignorant of the value of their merchandise, either when exported from the foreign country or when imported into this country, except so far as ignorance on the subject may necessarily inhere in the methods of their business or the nature of the commodities in which they deal. The law as now announced is not responsible for such an uncertainty.

V.

The plain statement of the fact here is that the importers claim that the duty should be chargeable upon the *quantity* actually imported in accordance with the rule of *Marriott* v. *Brune* (9 How., 619), and yet are not

willing to admit the countervailing claim that the diminished weight or quantity is nevertheless equal in value to the weight or quantity shipped. The truth of it is that under section 7 of the customs administrative act the importers might properly enough, along with their written entry of the merchandise, have allowed for the diminished weight but increased value per unit of weight by making, themselves, an equivalent addition to the cost or value per unit of weight given in the invoice. Do the importers think that Congress evidently contemplated the possibility of a change in the condition and consequently in the value of merchandise during the voyage of importation, and yet, when the change in value was an increase, acquiesced in the legality of exempting the increase from duty?

In section 23 of the customs administrative act, providing that there shall be no damage allowance, but that the importer may be relieved of the payment of duties upon damaged goods abandoned to the Government, the law does not bear the harsh construction which the petitioners seek to put upon it in their brief, because the language is scrupulous to allow the importer to separate from the remainder that portion of the goods so far damaged as to render their abandonment to his advantage, and retain the former upon payment of duties, with the entirely just proviso that the abandoned portion shall amount to 10 per cent of the total invoice.

In the case of these sugars, and in other similar cases, there is no deterioration, but the contrary; and as the importers in such cases are taking no harm from section 23 it is difficult to see why a compensation, imperfect or

otherwise, is due them under section 19. It may well be that under its revenue power and the necessary revenue regulations the Government is exactly in the position of demanding legally of an importer of merchandise which undergoes damage during the voyage (not mere change of condition) that the dutiable value shall be ascertained before the change, the abandonment provision sufficiently guarding the importer's rights; and on the other hand, that the dutiable value shall be ascertained after and not before a change of condition which increases the value. The apparent dilemma on this point in the importer's brief needs some such revision as the foregoing; and the courts below, by their opinions, gave it, in effect, just this revision.

VI.

The evil seen by the learned counsel for the petitioners because of the importers' uncertainty under the decisions herein, whether or not the merchandise will increase or decrease during the voyage, and whether or not, therefore, the duties upon imports may be calculated in advance, has been referred to and has been, I think, shown to be unfounded. The custom of the trade referred to in the opinions and in the evidence (pp. 21–22, 30, 46) in taking stipulations for a conditional price based upon the percentage of loss of weight within certain limits by decreased moisture, should enable the importers to forecast these doubtful and uncertain elements. This custom shows clearly that the Brazil price or value *was* the price or value less the water for which extra allowance was made. Certainly the rule of law announced does

not prevent them from doing so, and the contention that duty is paid twice, on the theory that a large part of the sugar customarily drains away into the bilge in the course of the voyage, appears to be both extravagant and irrelevant. It is extravagant because the reference in the record in case No. 2689 (circuit court of appeals), page 23, expressly states that the loss in weight during the voyage is due almost entirely to drainage of *water*. "There may be some loss—there may be some destruction or some damage by which some of the sugar is washed away; that I don't know. In all ordinary shipments of these goods the principal loss is due to the *evaporation or the water being eliminated from the sugar*." The contention is irrelevant, because it appears by the record in the other case (No. 2676, circuit court of appeals, p. 35) that the drainage "might be worth considerable and might not be worth much," and that it is not of sufficient value for the importers themselves to provide for its recovery and entry; and that it is unclaimed, unless, in a few instances only and when it is worth while, the captains of the vessels choose to enter it and pay duty on it.

Judge Townsend in his opinion puts the whole case in a nutshell when he says:

> It appears, therefore, that if the sugar had been kept for the same length of time in Brazil, the same loss in weight by drainage and increase in value per pound would have taken place there, and the value of the cargo as a whole would not have been affected thereby. If this be so, I do not think the importer should gain by the decrease in weight coupled with an increase in value per pound.

VII.

The "iron ore" instance is not analogous. *Earnshaw* v. *Cadwalader* (145 U. S., 247) decided that no statute ever permitted an allowance for the water chemically combined with iron ore, and that the act then in force (1883) "must have the same construction in regard to all moisture, *however mixed or combined with the ore*," which obviously included the moisture mechanically absorbed on the voyage of importation. The question whether "dried ore" was an article known to commerce was held to have been properly submitted to the jury, and the judgment upon the verdict in favor of the collector was sustained. This is the full import of the decision. No doctrine can be drawn from that decision which is significant here. It can not be held that because the moisture still in the ores was not deducted in that case, therefore the moisture which is actually drained away in this one shall be charged back against the importer, for that, of course, is not the importer's argument here, and all the authorities agree that the *weight* when landed is the test; and if the doctrine to be deduced is that the moisture shall not be so charged back, that was the result actually reached. But the *value* of the resulting weight having proportionately increased, the loss in weight was exactly offset. Now, on this remaining point *Marriott* v. *Brune* (*supra*) is instructive. That case decided that the weight when landed is the test, *although the aggregate value is thus reduced below the cost named in the invoice.*

If, however, the aggregate value, under such peculiar circumstances as here, had been maintained at or restored

to the aggregate cost named in the invoice, will it be argued that the weight would have been reduced without allowing for the relative increase in value? I think the decision itself, in favor of the importer, shows the contrary, for one ground thereof is thus stated by the court (9 How., 633): "Nor is his sugar improved in quality by the drainage so as to raise any equity against him." In the case at bar this very equity is raised against the importer, and *Marriott* v. *Brune* clearly requires the conclusion that if the same circumstance had existed there, either the weight would not have been reduced or the value per unit of weight would have been increased.

In view of all the facts it is submitted that the importer was not entitled at all to review by the courts, and that the present aspect of the question is not of such "gravity and importance" (*Lau Ow Bew* v. *United States*, 144 U. S., 47, 58) as to call for the writ.

JOHN K. RICHARDS,
Solicitor-General.
HENRY M. HOYT,
Assistant Attorney-General.

O

2420

No. 225 & 236.

Sup. of Atty. Gen. (Supt.)

Office Supreme Court U.S.
FILED
APR 10 1901
JAMES H. McKENNEY,
Clerk

Filed April 10, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

THE AMERICAN SUGAR REFINING Company, petitioner,
v.
THE UNITED STATES.
} Nos. 225 and 236.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

THE AMERICAN SUGAR REFINING Company, petitioner, *v.* THE UNITED STATES. } Nos. 225 and 236.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

I.

THE RULE OF FINALITY OF APPRAISEMENT AND ITS EXCEPTION.

The appraisement, or where reappraisement is sought, the reappraisement of merchandise, is final and conclusive under section 13 of the customs administrative act unless the appraising officers have proceeded upon some wrong principle contrary to law. If this exception does not appear in the present case, the importer has exhausted his remedy under the law, has no further recourse, and may not be heard. It is unnecessary to multiply authorities for this statement. The cases of *Auffmordt* v. *Hedden* (137 U. S., 310) and *Passavant* v.

United States (148 U. S., 214, 220) are sufficient authority for the general principle, while the second case of *Passavant* v. *United States* (169 U. S., 16) expresses the exception from that principle, citing earlier authorities.

II.

THE FACTS.

The only question, then, is whether the appraisement herein proceeded upon a wrong principle contrary to law. The first requisite is to discover just what the appraisers did.

In the three importations covered by No. 225 the appraiser reported to the collector as to two of them that the value of the sugar was advanced per unit of quantity 1s. 1d. per cwt. from the market value when shipped to the value in the condition as landed, "owing to its increased value due to drainage on the voyage of importation." As to the third importation, the report was of the same purport, but the respective values and the advance per unit of quantity and the polariscopic degree varied slightly from the other shipments. The sugar examiner, upon whose examination the appraiser's report was based, testified that the "market value" referred to in the report was the value of the sugars at the port of shipment in Brazil, of the quality landed and as examined here. The examiner then states that the sugars drain and moisture evaporates whether they stay in a storehouse in Brazil or, if shipped green, on the voyage of importation; and that the appraiser can

not tell whether the sugars are bought green or whether they are bought drained, and he shows that the increase in value due to drainage was imposed with due regard for the interests of the importers as not intending any fraud, so that they might "escape the penalty." That is, the Treasury Department was scrupulous to prevent the increase from showing an undervaluation. (Rec. No. 225, pp. 15–18.)

In No. 236 the Board of General Appraisers, upon reappraisement, found the actual market value or wholesale price of the merchandise at the time of exportation to the United States in the principal markets of the country whence imported as nearly 2 shillings per unit of weight (100 kilos) more than the invoice value. This made the "market value and price actually paid on basis of settlement * * * in packed condition" which was the "dutiable value in packed condition." And thereafter one of the general appraisers called as a witness testified that the price paid for such sugars is conditional, to be determined in this country with reference to loss of weight from decreased moisture on the voyage, and that upon this price settlement a certain test is made called the settlement test which is accepted by the Board of General Appraisers under an agreement between the Government and the importers as controlling, to which agreement these importers appear to have been a party (Rec. No. 236, p. 14). That is, the test of quality, and therefore of price upon the commercial transaction, was regarded as conclusive in determining the quantity or percentage of sugar on which

duty is to be paid. The use of the word "percentage" here plainly means that by quantity of sugar is intended the saccharine contents or strength or value under a polariscopic test. It was upon this settlement test that the advance in value was made, the advanced value being the equivalent in the country of exportation of sugar of the same test as that which arrived in the United States. "In other words," says the appraiser, "they held that the diminished quantity of sugar arriving in the United States was worth just as much as they paid for the original quantity as shipped from Brazil. We therefore found it on the basis of the settlement test to be 11s. 11d." (Rec. No. 236, pp. 10–13.)

Thus the question is seen to be whether the addition to value because of improved quality due to drainage—made with due regard for the protection of the importers from the technical charge of undervaluation, and in accordance with their own settlement of price, which postponed the completion of the transaction until the quality here after landing was shown—is contrary to law.

It is proper at this point to state the fact accurately regarding the effect of the drainage. Mr. Jacobs, the sugar examiner, says on page 19 of the record in No. 225 that such sugars will drain anywhere, and that evaporation is small because the drainage takes place; that the drainage is sometimes pumped out with the bilge and sold, and, if sufficiently valuable, would be classified as molasses, and, if entered—as it sometimes is—

would be taxed at the same rate as sugar. It seems likely that neither the witness nor the importers' counsel observed the direction to which this testimony was tending, because the effort of the importers' brief is to show that the drainage here was of more than water; that sugar and molasses drained away (for there is no claim that any of the sugar was damaged or lost by washing away), and that the drainings were valuable. Yet they took pains to show (Rec. No. 225, p. 20) that the American Sugar Refining Company never entered the drainage or bilge water pumpings and made no claim for damage allowance thereon. Now, it is obvious that if there had been any appreciable loss from drainage—if molasses or sugar to a valuable extent, as well as water, drained away—the importers themselves would have recovered the substance and would have entered it on their own account.

In this connection the importers' brief implies, or, indeed, says (p. 19), that 16 per cent of the sugar has been lost by drainage. "Sixteen out of every hundred pounds of sugar shipped as sugar disappeared during the voyage." But the statement of fact in the record is as follows (No. 236, p. 13, Mr. Sharretts being the witness): That the sugar as shipped contains 16 per cent of moisture, and that the importers pay less for it than if it contained 8 per cent; that proportionately to the moisture lost by drainage the sugar becomes more valuable because of drainage on the voyage of importation; that when it started it may have contained 16 per cent of moisture and when it was landed it may

have contained 8 per cent. So that the 16 per cent referred to in the importers' brief really means the total amount of moisture which the sugar contained upon shipment, of which half was lost during the voyage. This witness thinks that the loss in weight is due almost entirely to drainage of water. There may be some destruction or damage by which the sugar is washed away, but he evidently does not think so. "In all ordinary shipments of these goods the principal loss is due to the evaporation or the water being eliminated from the sugar." That is the principal loss in weight. (No. 236, p. 13.)

The importers' own witness, Mr. Sherer (No. 236, pp. 15–17)—who, if the strict rule as to the competency of witnesses upon such commercial questions had been enforced, could not properly have been heard—explained the trade price arrangement, the stipulation being that the loss of weight should not exceed a certain per cent, and final settlement was made upon that basis. He concedes that "the test was considered also on arrival here," and, speaking generally of such shipments, he thinks that they lost more or less not only of water but of sugar, and that the cargo continued to drain sugar and water all the way over, although what was left tested more and was worth a higher value. Nevertheless, on being asked the question, "Was the drainage in that case [that is, the invoice under consideration] lost on the voyage of any value?" his answer is, "No. It was a loss because it was pumped out with the bilge water." In other words, as we con-

tend, it was because it was of no appreciable value that the importers themselves did not enter it.

Of course, the importers, while making the point that the drainage decreased the sugar as well as the moisture, practically admit more than once in their brief that the gain in quality offsets the loss in weight; that for this reason they find it to their advantage to import green or wet sugars rather than dry or cured sugars, and thus lessen the cost of their raw material, and that, the plain language of the law giving them this legitimate opportunity to adapt their business in view of this advantage, it makes no difference that Congress did not see the defect or omission in the law, or that it is not pleasing to the equitable views of customs authorities or to the courts. All these things amount to a frank statement that the importer is taking advantage of the law, but, doubtless, without any covert or fraudulent methods. The only question is, Does the importer's view correctly state the law? The importer frankly says, in effect, that he has deliberately arranged his trade so as to bring an article into this country which loses in weight and gains in value upon the voyage, because he knows that only the weight landed can be taxed, and thinks it a fair venture to seek to establish the value of the *quality* shipped as the crucial test of foreign market value. The court will please observe that it is the *quality* rather than the *condition* of the merchandise shipped which is really involved. It is submitted that upon the matter of drainage we have shown sufficient evidence from the record, and indeed

from the testimony of the importer's own witness, as well as from that of one of the general appraisers, to justify completely the statement of Judge Townsend—referred to upon page 5 of their brief as based upon a radical misapprehension of the evidence and the law (see also Id., pp. 6, 7)—that the cargo is actually worth as much as when it started.

I venture to suggest that neither experience nor science justifies the notion that any appreciable quantity of saccharine matter is carried through the cargo to the bilge water. Bags of sugar thus superimposed upon each other naturally act like a filter, and as the water drops the sugar in solution will be caught and retained in the mass. This is probably the fact rather than that the water "takes toll" as it passes. Especially would this be the case because of the containers, the bags. Surely no molasses would pass through such a mass, nor any solution of water highly charged with saccharine crystals. The cloth fiber of the bags would act as a very fine sieve, which would permit the passage of the moisture of the water but retain the solid elements. One proof of this is the fact (not appearing in the record, but perfectly well known) that the importers themselves boil the bags and thus recover the sugar from them. I respectfully submit and urge that all the facts proved in this case, and necessarily existing because of the nature thereof, show beyond peradventure that nothing of substantial value passed into the bilge water; otherwise the importers themselves would have recovered the bilge-water contents as they ordinarily do the sugar held in the meshes of the bags.

III.

THE LAW OF THE CASE AND THE EQUITIES, AS INDICATED BY CERTAIN AUTHORITIES.

The customs administrative act records the final development of revenue procedure, and has replaced as a complete system all previous enactments upon the matters embraced therein. If an existing section of the Revised Statutes has not been specifically repealed by section 29 of the customs administrative act, it has quite as effectually disappeared under the general repeal clause of section 29, if the provision of the Revised Statutes is either repugnant to a provision of the customs administrative act or has been entirely supplied by the latter. The law of the Revised Statutes in that case is then practically obsolete. Thus section 2904 of the Revised Statutes, which the importers think requires the condition of imported merchandise to be appraised with reference to its "condition" upon the very day of shipment from the foreign port, is not properly invoked here, because the customs administrative act indicates the complete rule on the subject by carefully chosen language which is repeated several times in slightly different forms, and especially because of the provisions of section 19. And even if this were not so, section 2906, Revised Statutes, like section 2904, has not been specifically repealed, and section 2906 directs the appraisement to be made upon the actual foreign market value "*at the period* of the exportation to the United States." Section 2906 applies to the present case quite as much as section 2904, because

the one applies "when an ad valorem rate of duty is imposed on any imported merchandise" (sec. 2906) and the other applies "when the duty upon any imports shall be subject to be levied upon the true market value" in the foreign market (sec. 2904). So that, although the value in the foreign market of the merchandise in the "condition" as respects *quality* when landed here may be a more intricate inquiry if held to the "day of actual shipment" than if determined as of the "period of the exportation," such difficulty in degree of the inquiry by no means overthrows the true rule for which the Government contends, namely, the value in the foreign market of the *quality* landed here, and any remaining doubt upon that point is resolved when it is considered that neither section 2904 nor section 2906 gives the rule, but that the subject is controlled by the express law of the present revenue system under the customs administrative act.

PROVISIONS OF THE CUSTOMS ADMINISTRATIVE ACT.

Analyzing now that act, the attention of the court is called to the fact that all through the law the merchandise referred to is *imported merchandise*—that is to say, the merchandise as it reaches this country. That is one reason, probably the chief reason, why the weight *landed* is the test of dutiable weight. Both sense and justice combine to show that not the amount of merchandise shipped, but the amount of merchandise landed on our docks, represents the proper quantity or weight. That *is* the *imported merchandise.*

And again, all through the law the phrase "such merchandise" is constantly used, referring back to the words "imported merchandise." Thus it is in section 2 of the customs administrative act, in which *such merchandise* must be correctly described by the invoice; and again, in section 7, relating to the right of the importer to make an addition to his entry in a certain case, and then providing for additional duties and a penalty for intentional or constructive undervaluation. And so it is again in section 19, which is especially in issue in this litigation.

Now, we contend that the spirit, if not the actual language and intent, of such provisions as that in section 3 requiring the invoice to show all discounts, bounties, or drawbacks allowed, and section 4 requiring the importers to produce any papers or statements of account which may assist in the ascertainment of value (which requirements are, with some variation of language, incorporated in the declarations of section 5) shows that when any such arrangement appears as the test of quality in this country and postponed payment disclosed in this case, it is a highly proper proceeding and one really contemplated by the law, for the importers themselves to make addition to value. The law intends that the real value of the merchandise as landed, based upon the quality then shown and upon the importers' own agreement as to price and the method of determination thereof, should be placed upon the merchandise.

Of course, such voluntary accomplishment of the intent and the just purpose of the law could not, perhaps, be expected from importers who frankly say that

they are taking advantage (what they consider to be a fair advantage) of what they conceive to be the literal terms of the statute. On the other hand, in this case, as is shown by these records, and in the like case of hides, which improve in quality as they dry, as shown by Treasury records, the Government has been scrupulous to prevent the proper addition to invoice or entered value, based upon the principle which we are now invoking, from subjecting the importers to the technical charge of undervaluation and to the penalties therefor under section 7 of the customs administrative act.

I give in an appendix a letter addressed by the Secretary of the Treasury to the collector of customs at Philadelphia, dated April 16, 1896, which shows the Government attitude on this point in a case involving sugar. It seems proper to submit this letter to the court, although it is from unpublished records of the Treasury. I also insert in the appendix a recent letter from the Secretary of the Treasury to the collector of customs at New York, with the reply thereto, upon the aspect of the question, especially regarding undervaluation, in connection with hides.

Section 10 of the customs administrative act directs the appraisers to ascertain, estimate, and appraise, by all reasonable ways, irrespective of invoices, affidavits, or statements of cost, the actual market value of the merchandise (that is, the merchandise as *imported*) at the time of exportation to the United States. This broad direction covers clearly such a revision of value

as here, if only for the reason that the importers' own arrangement for test of quality and settlement of price shows the realities of the case and justifies the addition.

Section 11 authorizes the appraising officers, when the value can not otherwise be ascertained to their satisfaction, to ascertain the cost of production by cost of materials and fabrication and general expenses, including the expense of preparing for shipment. The concluding portion of that section permits the appraising officers in such doubtful case, in determining dutiable value, to take into consideration the wholesale price at which such or similar merchandise is sold or for sale in the United States, from which, we contend, it is evident that the foreign value of the merchandise as landed here may be reached by appraisers with a certain reference to the value of the same sort of merchandise in our own markets. This is a general and reasonable principle, and in construing that provision it should not be forgotten that, after all, the appraising officers are necessarily clothed with a wide discretion as to the means and processes by which they reach value; that their authority and discretion has been fully sustained by the courts, and that their conclusions are final, unless they have exceeded their authority and made a clear mistake. The statutes and the decisions leave no doubt that the nature of appraisement requires a rule on this point, subject to a particularly narrow range of exception.

The first sentence of section 2904, Revised Statutes, may be taken to imply that there are, or were under

previous laws, circumstances or merchandise in reference to which the foreign market value was not the test, or was not the sole test, which idea connects that section with the concluding portion of section 11 of the customs administrative act, *supra*. The distinction thus indicated may, however, refer only to the difference between *ad valorem* and specific duties.

Section 16 is further evidence that the appraising officers are intended to scrutinize the real nature of the transaction on the question of value, to take testimony irrespective of the importers' showing upon the invoice and entry, and, we submit, to carry into effect by an addition to value such a guide to the truth of the transaction as the price agreement here upon guaranty of maximum loss of weight and upon settlement test.

The significant language of section 19 is as follows:

> * * * Duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities at the time of exportation to the United States in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, * * * including the value of all * * * coverings of any kind, and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States.

It is first to be remarked upon this statute that the phrase relative to covers and condition is repeated in

various portions of the act specifically (e. g., in the declarations of section 5; and for general language of similar import see section 11), and refers to packing or preparation for shipment chiefly and perhaps solely. The word "condition" as first used in section 19 is to be construed by reference to the same word as used later in that section, in which plainly it refers to the preparation for shipment, and so it is in the other portions of the act where the same or similar language is used. In the declaration of the manufacturer or owner (section 5), just before these phrases in reference to coverings and condition "ready for shipment," appears the requirement that the invoice shall contain a just account of the cost of finishing the goods "to their present condition" Here is a further indication that the important condition is the *present condition*, the condition in which the goods arrive in this country. Of course it is evident that many kinds of goods, especially ordinary manufactured goods, do not change their condition, and that their present condition is the same substantially as their condition when shipped. But that is no reason for holding, when there *is* a change of condition, that the *present condition* does not refer to the state of the goods when they are landed. "Condition" in these provisions obviously refers, as the circuit court of appeals said, to the "preparedness of the merchandise for shipment."

Section 19 plainly requires that it is the value of *such merchandise* as is brought into this country which is to be determined as at the time of exportation to the United

States. So far as the language of the law is concerned it does not seem necessary to dwell more upon the reasons for the view of the courts below, as put by the circuit court of appeals, viz: "*It is incumbent upon the appraiser* to ascertain the value of *similar dry sugar in the markets of Brazil.*"

The astonishment of the learned counsel, who italicises similar statements from the opinions below, can not change the fact that under all the circumstances, and under the terms as well as the meaning of the law, it was very proper and precisely accurate to fix the value of the merchandise in view of the quality which arrives at the port of New York. Otherwise it would not be *such* merchandise, imported merchandise, which the appraisers were valuing; it would be the *exported* merchandise, the wet sugars as they left Brazil, a very different article from the goods imported. It was the latter merchandise and not the former which the appraisers were to inspect, examine, test, and appraise "by all reasonable ways and means" in order to ascertain the quality and value.

Section 23, providing a damage allowance, can in no way affect this question. The United States is not in the least responsible for the breaking of glass or the decaying of fruit on a voyage, and yet they say, properly as well as justly: "While we can not allow for a claim of damage unless it amounts to 10 per cent [which is entirely reasonable], you may, when the damage exceeds that percentage, abandon to the United States *all or any portion of* the goods, and so

be relieved from the payment of duties on the portion abandoned." The history of such provisions in the law shows that, as in the matter of undervaluation, there were great abuses in damage claims, and this statutory result is plainly in the interests of justice and recognizes a valid and proper claim to its full extent. The required minimum of 10 per cent is in the line of similar reservations all through the laws; that requirement is to insure good faith or to prevent trifling claims. There is no relation between the damage situation and the present one. The argument of the importers is that as the United States insists that the condition of the goods when exported shall be the test when there is loss or deterioration, so equally should it be the test when there is improvement in quality. But that analogy or antithesis is in no way justified by section 23. The United States simply says in that section, without reference to the condition of shipment, or to that condition as a test of dutiable quality, where the voyage results in substantial breakage, destruction, deterioration, or loss in other ways, "You may abandon to us the portion so damaged, and be relieved of duties *pro tanto*." That is all there is of the matter, and there is no such dilemma as the importer suggests.

THE DECISIONS AND THE TREASURY RULES.

Turning now to other guides in the law—the Treasury regulations and rulings, and the decisions—we find that upon the question of the value upon which duties

should be assessed the Treasury Department in T. D. 8159 formulated the rule that the weight of merchandise which arrived, multiplied by the proper value per unit of weight, was the correct rule in accordance with *Marriott* v. *Brune* (*infra*) and other authorities. This rule was revoked in T. D. 8380 in the "castile soap case," in accordance with the regulation then in force that no allowance should be made for difference in invoice weight and the weigher's return, for the reason that the value of the article appreciates in proportion to the diminution in weight. The Department was there reinstating a mistaken endeavor to find the proper rule, made previous to T. D. 8159, by which, instead of adding to the *value* of the *weight unit*, they sought to sustain the invoice weight. Ruling 8380 was the subject of litigation in the case of *Weaver & Sterry, Ltd.*, v. *Saltonstall, collector* (38 Fed. Rep., 493), in which Judge Colt sustained the importers' contention and held that the collector should have assessed duties only upon the *quantity* of soap which arrived in port, following *Marriott* v. *Brune*, and pointing out that that case held that the decision therein was not inconsistent with the proviso in section 8 of the act of 1846, because the proviso refers only to the *price* and not to the quantity. That is, it was considered that the word "amount" in the proviso in question, providing that duties shall not be assessed upon an *amount* less than the invoice value, does not refer to the quantity or weight of the goods. The same provision occurs in the customs administrative act as the last sentence of

section 7. Thus the report of the case of *Weaver & Sterry* v. *Saltonstall* does not indicate that the correlative claim of increased value per unit of weight due to improved condition in proportion to loss of weight was presented to the court or was decided.

In consequence of that decision T. D. 9305 was promulgated in 1889, in which the present rule was defined (referring to T. D. 8159 and 8591) as follows: That duty should be levied upon the invoice or entered value where a lump sum is paid for the merchandise, without referring to the precise number of pounds or tons landed, the value per pound or ton to be ascertained by dividing the value of the entire invoice by the quantity shown by the weigher's return; and in case the merchandise is invoiced at a price per unit of weight, then that price shall be understood as the unit of value to which the statutes refer (section 2900, Revised Statutes, now incorporated in section 7 of the customs administrative act), and the appraised value can not be less than such unit of value per unit of weight, but may be advanced in case the appraiser and collector should find that the foreign market value of the goods in the condition in which they are entered should exceed the price per unit of weight specified in the invoice.

> In the case of castile soap and other commodities where the difference between the invoice weight and the weigher's return may be due to evaporation or other like causes, and it appears to the satisfaction of the appraiser and collector that the foreign market value per

> pound of the goods landed has proportionately enhanced, so that there has been no diminution of the total entered value of the invoice *in the foreign market* notwithstanding the shrinkage in weight, it would seem to follow that the foreign market value per pound would be represented by the result which would be obtained by dividing the total foreign market value of the invoice by the number of pounds landed. (T. D. 9305.)

The regulation to which these Treasury decisions refer as No. 604 appears in the present edition (1899) to be No. 1453, which refers to T. D. 9305 and is as follows (art. 1453):

> Where a deficiency of weight may have been produced by evaporation during the voyage, *or other like causes*, and it appears to the appraiser that *the foreign market value per pound has been proportionately enhanced*, so that there has been no diminution of value by loss of weight, the dutiable value may be obtained by dividing the total entered value by the number of pounds landed, and the appraiser will make a corresponding addition to the invoice value.

This has been the Treasury construction of the law since T. D. 9305 was promulgated in 1889, under the law before the customs administrative law was systematized in 1890, and ever since that time.

The decisions have foreshadowed the view of the court on the equity actually involved here in cases where that equity did not appear. We should find it hard to believe that a view of the law which was with-

out equity or justice and without sense or logic as well, which involved an entirely absurd and unreasonable result, could be a correct view of the law any more than a sound equitable construction. A case cited by the learned counsel (*Farmers' Loan and Trust Co.* v. *Oregon Ry. Co.*, 24 Fed. Rep., 407) states the rule which this court has often stated regarding the construction of an act by surmise or conjecture, and denying the right of courts to interpolate or strike out language in a law in order to avoid supposed incongruities. One of the last examples of that ruling by this court is found in *United States* v. *Goldenberg* (169 U. S., 95, 103):

> No mere omission, no mere failure to provide for contingencies which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.

But those decisions relate to cases where it was necessary, perhaps, to do some violence to the language of the law in order to reach what was claimed to be a logical or just construction. Here, on the other hand, it is purely a matter of construing the language of the law exactly as it is, and the question is merely whether such construction to be sound may or may not regard, as tending to show the legislature's real intent, such lights upon the language as the circumstances of the case and considerations of common sense, as well as rules of logic and equity, may furnish.

Recurring, then, to decisions which approach the determination of this question: In the case of *Marriott* v. *Brune*, heard first below as *Brune* v. *Marriott*,

arising under the tariff act of 1846—and with reference to administration under the tariff act of 1842 as well—before Chief Justice Taney, sitting on circuit (Taney, 132), it was determined that the effect of the sixteenth section of the tariff act of 1842 (5 Stat., 563) [which is substantially preserved in sections 10 and 19 of the customs administrative act] was, whenever an ad valorem duty was imposed, to charge it only upon the amount of merchandise actually imported. It is clear from the language of the learned Chief Justice that there probably was in this case an actual "diminution in value" which was occasioned "by damage to the quality on the voyage or loss in quantity." Besides that reference to actual loss to the importer, the court says:

> If the duty is charged upon what is lost as well as what arrives, he will in fact pay, in almost every case, a higher duty on his importation than the law intends to impose. * * * It would hardly comport with this policy [the liberal spirit of the tariff of 1846] to place in the law a proviso which, upon articles so important in commerce as sugar and molasses, would in many cases make the duties higher than they had ever been before, and, indeed, in almost every cargo make them higher than the rate specified in the law. We think the proviso refers to the price stated in the invoice, and not the quantity, and did not repeal the former law authorizing deductions and allowances to the importer in the cases mentioned.

Here the Government does not claim a right to interfere with the rule upon quantity, and as to the price, the language quoted, we contend, implies very clearly that if the total value arrives in this country, nothing less than that shall be taxed, and justifies also the inference, upon which the Treasury regulations proceed, that the price per unit of weight may be advanced so as to make, multiplied by the number of weight units actually arriving, the invoice value in gross.

In the Supreme Court the decision below in *Marriott* v. *Brune* was affirmed, the statement of the syllabus being that "duty is to be assessed, not upon the weight of sugar in the invoice, but the weight when landed; although no express direction is contained in any law to make an allowance for loss of weight of sugar by drainage; and although the aggregate value is thus reduced below the aggregate cost named in the invoice." (And see *Lawrence* v. *Caswell*, 13 How., 488.)

Before pointing out the significant difference between that case and this, it will be proper to quote from the reasoning of the decision on which the result was reached.

> The invoice may be prima facie evidence of the result of this and other causes in establishing that price [the price abroad]; but for a quarter of a century it has been departed from by the appraisers if the facts ascertained by them will warrant it; *though their action and decision as to the price are understood not to be here in this respect in controversy.*

Commenting upon the law that the duty shall not be assessed upon an amount less than the invoice value, as apparently relating to the enactment that the owner may raise the assessment to the true market value in the country whence the importation was made, the court proceeds:

> If, however, it was meant to be general, as seems more likely from previous laws, and to hold the owner to his invoice in all cases by a species of estoppel, so far as not to let it be made lower than was originally admitted in the invoice, then the restriction manifestly relates to the price only. He need not be estopped about the quantity in the invoice, as the duty is not assessed on the quantity abroad, but on the quantity reaching home and entered and ascertained by law by the measurer and weigher here. But he might properly be in respect to the price, as it is on the price abroad and charges added that the duty is by law to be assessed.

Now, if the owner is estopped from questioning his own invoice price, although he is permitted to show the actual weight landed, notwithstanding the invoice, is he not upon the same principle estopped from questioning the price which he actually and finally pays by his own arrangement with relation to the quality and condition of the goods when landed, although that is not the price of the invoice? That the court had in mind the question which has now come to an issue is shown by the following paragraph as the final reason why the quantity actually received should be the quantity

assessed: "Nor is his sugar improved in quality by the drainage so as to raise any equity against him by it. The evidence in the ensuing case from New York, which was argued with this, shows that the article usually becomes of a worse color and quality than before, though if not drained at all, it might ferment and become still more inferior. And the "ensuing case" was the case of *United States* v. *Southmayd*, in which the court says:

> Again, if the owner was benefited by this drainage in the improved quality of the sugars or molasses left, and to the extent of the loss in weight, there might be some equity in considering him liable for the weight abroad; but, as explained in the preceding case, such does not seem to be the current of the evidence.

Counsel for the importers quotes this decision *in extenso*, although we contend that, like *Marriott* v. *Brune*, it is of the greatest authority and significance in the Government's favor. The court obviously would have sustained an addition to the invoice price if the evidence had justified that course, because they say:

> If the price is fixed too low there, or lower than it should be on the quantity likely to be saved and to arrive here, it is the duty of the appraisers to raise the price, and it must be presumed they would raise it if required by all the facts. * * * Again, the duty here is regulated by law, * * * and by law it is imposed on the quantity entered here, and

not the quantity shipped abroad, and on the *true* price abroad *as estimated by the appraisers*, and not necessarily as estimated by the owners.

The learned counsel are perhaps conscious of the adverse stress of this case, because they interpolate a passage in the opinion as given on pages 22 and 23 of their brief pointing out that the price was raised here legitimately in accordance with the court's view when it was fixed at 6s. 8d., and that they are only complaining of the further advance to cover increase of value during the voyage. I find nothing in the record to indicate that the invoice price was less than 6s. 8d. (Rec., No. 225, pp. 15, 16) in the importations by the *Swan* and *Richmond*, or than 7s. 2d. by the *Bellaura*, to which the addition was made to reach the market value when shipped. The clear inference from the record is that the "market value when shipped" per hundredweight was the invoice value, and that only one addition was made by the appraisers. This is confirmed by the state of the case in No. 236 (p. 10), by which it appears that the *Cuvier's* cargo was advanced from an invoice value of 10s. 0d. per weight unit to 11s. 11d. In other words, in all importations there was only one advance and it was for the same reason in each. It will be observed that there was a similar purchase arrangement in the Southmayd case, namely, "when sugars of this kind are purchased abroad the buyer usually takes into consideration in fixing the price that the drainage or waste in weight will probably equal near 5 per cent on the whole. It is argued that the

price abroad is therefore lower in this proportion on this account; and hence that no deduction should be made here for what is taken into consideration there."

It is evident, I think, that the only reason why this argument was not considered in that case was because the court says the current of evidence shows that the owner was not benefited by improved quality due to drainage. In the present case it is clear that he is benefited and that there is no substantial corresponding loss. The agreement simply is that the loss in weight shall not exceed a certain per cent, or, if it does, that the price shall be reduced ratably and that the polariscopic test of quality shall be an element in fixing the price. In the earlier days it is likely that the failure to improve in quality, or the actual deterioration, was due to the nature of the sugar or the conditions of packing and stowage on the voyage. The *Marriott* v. *Brune* case shows that sugar cargoes sometimes fermented, and the quality test then was the color test and not the polariscopic test, which now shows unerringly the relative quality when shipped and when landed.

The learned counsel, arguing on the proposition, which we claim is disproved in the case, that there has been a substantial loss of real value of sugar or saccharine matter, proceeds to contend that the duty must be levied, collected, and paid on sugar and not on *sucrose*, which is a chemically pure substance and with which various impurities and a certain percentage of water are combined in *sugar*. But the reply to that is

that it is sugar still, and not sucrose, which arrives in this country, but the sugar is more valuable just in proportion to the water drained and just as their own tests show.

The case of *Earnshaw* v. *Cadwalader* (145 U. S., 247, 259) is not at all similar. The importer there contended that the dutiable weight assessed by the collector was made up of water mechanically present in iron ore, and that he should receive the benefit of the reduction of moisture after drying in the sun or by artificial heating. The case was disposed of by the court on the ground that *dried ore* was unknown to commerce, and that water in mechanical combination with ore is one of its natural and constant constituents. The learned counsel's quotation from the case (p. 19) contains the following passage: "Held, that it was the duty of the collector to assess the duty upon the ore in its condition at the time as of which he was required to appraise it, including the percentage of water it contained." I do not find that passage in the opinion, although it is obvious that by its "condition at the time as of which he was required to appraise it" must necessarily be meant its condition when it *was* appraised, because the result of the case was "that duty was assessable on the number of pounds of iron ore reported by the United States weigher, and not on the ore after the moisture was dried out of it." That is to say, it was appraised here in the condition in which it was weighed, and in that condition its foreign market value was fixed. On this point of the con-

dition as imported, being the test for dutiability, see *Worthington* v. *Robbins* (139 U. S., 337) and *United States* v. *Schoverling* (146 U. S., 76). Appraisement as well as classification appears to require the same rule.

CONCLUSION.

It does not seem necessary to delay the court by further citation of authorities. The strict legal question is whether an importer, whose interests in case of actual loss or damage are fully and equitably protected, shall have the benefit of the weight when landed as the proper test of weight, and shall also have the benefit of the foreign-market value of the quality which was shipped, much inferior to that which was landed, although the loss of weight has caused no loss to him and although both on weight and quality he is fully protected against the shipper by his price agreement. Does the statute permit that result?

A practical aspect of the question may be put as follows: Is it legal any more than equitable for an importer to stand on the established law as to dutiable weight, and, expecting to establish his contention as to foreign market value, arrange his business so as to ship a commodity which loses in weight and gains in quality on the voyage, and then complain because he is assessed on the *foreign market value* of that improved quality? Can he logically or justly say that the quality of his sugar when landed here, which is identical with the quality which it would have possessed if it had drained in a Brazil warehouse before it was

shipped, is not the "condition" to which the statute refers? We respectfully submit that the "condition" of section 19 of the customs administrative act does not refer to the inferior quality of the sugar when it leaves Brazil. The value per unit of weight in the foreign market of the sugar of the quality which was landed is the legal test. This is the value which the appraisers determined. All reasonable presumptions are in favor of the finality of their conclusion, as the authorized Government experts upon this subject. They did not proceed "upon a wrong principle, contrary to law."

We respectfully submit that the appraisements in these cases should be sustained and the judgment of the courts below be affirmed.

HENRY M. HOYT,
Assistant Attorney-General.

APPENDIX.

FEBRUARY 19, 1901.

The COLLECTOR OF CUSTOMS,
New York, N. Y.

SIR: Referring to your letter of the 2d instant, transmitting the application of Charles A. Schieren & Co. for the remission of the additional duty, in amount $189.12, levied under section 32 of the act of July 24, 1897, on certain hides imported per *Statendam* July 9, 1900, entry No. 112559, I have to state that from the facts as shown by your report it would seem that there is a technical but not an actual undervaluation of the hides, if the condition in which they were shipped is taken into consideration. Green hides were exported and the invoice appears to correctly state the value for such hides at the date of exportation. The amount or extent of shrinkage of any given number of hides on a voyage of importation must be a matter largely of conjecture, for the maker of an invoice can not, with any degree of accuracy, foretell what such shrinkage will be. I do not believe that the framers of the act had in contemplation the imposition of additional duties in cases of this kind. However, the importers' equities in this case are so strong that I am loath to deny relief, and I have to request an expression of your opinion as to whether in such cases the quantity actually landed multiplied by the unit of value as found by the appraiser should not be considered the appraised value, or whether the quantity shipped multiplied by the unit

of value stated in the invoice should not be taken as the invoice value, for the purpose of determining whether there is or is not undervaluation.

Respectfully,

O. L. SPAULDING,
Assistant Secretary.

OFFICE OF THE COLLECTOR OF CUSTOMS,
Port of New York, N. Y., March 6, 1901.

The Honorable
THE SECRETARY OF THE TREASURY,
Washington, D. C.

SIR: I have the honor to acknowledge the receipt of Department's letter of February 19, 1901 (3878–K.) (A. J.), relative to the application of Charles A. Schieren & Co. for the remission of the additional duty, amounting to $189.12, levied under section 32 of the act of July 24, 1897, on certain hides imported by them in the *Statendam*, July 9, 1900, entry No. 112559.

I have carefully considered the views expressed by the Department in its letter of February 19, 1901 (3878–K.), particularly that portion requesting an expression of my opinion whether the quantity actually landed multiplied by the unit of value as found by the appraiser should not be considered the appraised value, or whether the quantity shipped multiplied by the unit of value stated in the invoice should not be taken as the invoice value, for the purpose of determining whether there is or is not undervaluation.

As to the particular case under consideration, I have to state that if the total aggregate entered value is compared with the total aggregate appraised value there will be no advance, and a treatment on that line of

comparison would accord with Department's ruling of April 16, 1896 (1531 H.), in the case of the Franklin Sugar Refining Company at Philadelphia, said Department's letter being addressed to the collector of customs at Philadelphia, Pa. As to the adoption as a general rule of the method suggested, I am of the opinion that it would be inimical to the best interests of the Government for the following reasons:

First. Section 10 of the act of June 10, 1890, requires that the appraiser shall "appraise (any invoice or affidavit thereto or statement of cost * * * to the contrary notwithstanding) the actual market value and wholesale price of the merchandise, at the time of exportation to the United States, in the principal markets of the country whence the same has been imported;" hence, the appraising officers appraise and return to the collector the market price per unit, and not the total value of the aggregate units. Moreover, at the time of appraisement the appraising officers, as a rule, are not acquainted with the number of units landed in the United States, as shown by the return of the United States weigher.

Second. Section 32 of the act of July 24, 1897, requires that the additional duty imposed thereby shall be levied on the particular article or item on the invoice that is advanced irrespective of other similar items. Article 1266 of the Customs Regulations of 1899 requires that the appraiser shall make his addition in a specific sum per pound, yard, or other unit of value, and not by percentage, and in the weight, gauge, or measure expressed in the invoice. Article 1267 of the Customs Regulations of 1899 requires that the invoice shall be forwarded by the appraiser to the collector, who (the collector) will at once give

notice of the advance to the importer on Form Cat. 600. This notice is invariably given before the liquidation of the entry, so that the question of valuation may be determined in the manner prescribed by law before the collector assessed the duty. This action of giving notice to the importer so that he may avail himself of the prerogative of section 13, act of June 10, 1890, is in harmony with the law, as section 13 distinctly states that the appraised value or the reappraised value by one of the general appraisers, or the reappraised value by the board of three general appraisers, as the case may be, is the basis or value upon which the collector shall levy the duties, "and their decision, or that of a majority of them, shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein, and the collector or the person acting as such shall ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise, and the dutiable costs and charges thereon, according to law."

Third. Article 1419 of the Customs Regulations of 1899 requires that duties must be assessed on the actual quantity imported, as shown by the return of the United States weigher.

Fourth. Article 1431 of the Customs Regulations of 1899 distinctly states that the "additional duty is not incurred by a simple excess of quantity ascertained on importation over the quantity expressed in the invoice, but only where the value of the article, as given in the invoice and entry, shall be below the appraised value. The regular duty is, however, to be assessed on the excess ascertained."

Fifth. Article 1453 of the Customs Regulations of 1899 states "where a deficiency of weight may have

been produced by evaporation during the voyage, or other like causes, and it appears to the appraiser that the foreign market value per pound has been proportionately enhanced, so that there has been no diminution of value by loss of weight, the dutiable value may be obtained by dividing the total entered value by the number of pounds landed, and the appraiser will make a corresponding addition to the invoice value." This rule is not understood to be mandatory, but permissible. This article (1453) emanated from T. D. 8159, prior to which this office held, as in the case of castile soap, that the invoice value represented the quantity landed when the said landed weight was less than the invoice weight, and the importers received the full complement of their importation, to wit, the full number of boxes and the full number of bars of soap in the boxes.

The theory upon which such action was based was predicated on the fact that the soap was worth as much in its hardened and shrunken condition at the time of its being landed in the United States as it was in its green state when shipped from the foreign country, and consequently there should be no rebate of duty for the difference in the weight of the soap as shown by the return of the United States weigher. This view was overruled by the Department on April 4, 1887 (see T. D. 8159), which decision was subsequently revoked by the Department on August 10, 1887, T. D. 8380. The latter decision of the Department, T. D. 8380, became the subject of litigation, and was overruled by the courts (see T. D. 9305 and Federal Rep., vol. 38, p. 493); hence the framing of article 1453 of the present Customs Regulations. In T. D. 10593 the Department held that it was the item that carried the penalty and not the aggregation of all similar items.

Sixth. It is respectfully submitted that to mix the questions of weights and values together for the purpose of determining the percentage of advance would be mathematically incorrect, and if adopted as a general rule would lead to inexplicable confusion.

In cases where it is shown that the appraiser's advance, or any portion thereof, was made for the purpose of compensating for the changed condition of the imported merchandise between the time of its shipment from the foreign country to its importation into the United States, such change being beyond the control either of the exporter or the importer, it would seem only fair and equitable that the appraiser's advance, or such portion thereof that was made for the purpose of making good the changed condition of the article, should not be held as an advance per se by the appraiser to make market value, but only that portion of the appraiser's advance should be charged against the importer in computing the percentage of advance as was made in fact to make the per se market value of the unit. If the rule was confined to such exceptional cases, it would be, in my opinion, as far as the Department might safely go.

Respectfully, yours,

J. J. COUCH,
Special Deputy Collector.

APRIL 16, 1896.

COLLECTOR OF CUSTOMS,
Philadelphia, Pa.

SIR: The Department is in receipt of your letter of the 30th ultimo reporting further upon the application of the Franklin Sugar Refining Company, that their

entry, dated March 29, 1895, covering certain muscovado sugar per *Motley* from Pernambuco be liquidated without the assessment of penal duties.

You report that the entry covered 11,511 bags, invoiced at a weight of 1,903,170 pounds, and entered at the value of $23,847; that the weigher's return at your port showed that there were 1,616,197 pounds landed, which amount was appraised by the Board of General Appraisers upon reappraisement at a total value of $24,268. The loss of 287,073 pounds is accounted for by drainage on the voyage of importation. You report further that the invoice price per hundredweight was 5s. $9\frac{1}{5}$d.; that the appraised value was 6s. $9\frac{3}{4}$d., which latter value was advanced to 6s. 11d. by the general appraiser upon reappraisement proceedings; that the polariscopic test stated as the basis of the price in the invoice was 87°; that the actual polariscopic test at your port was $86\frac{7}{10}$°, and that the actual test on the date of shipment was approximately 82 per cent, thereby showing an increase in polarization of a little less than 5°, due to drainage on the voyage of importation.

It appears from the evidence submitted in this case that it is the practice in the sugar trade to invoice the estimated test of Brazilian sugars at from 1 to 5 degrees above the actual test at its time of importation, in order to allow for the increase in polarization from the voyage of importation. It also appears that the prospective loss in weight had been discounted in the invoice price of the said sugar.

As the appraised value of the entire shipment ($24,268) does not exceed its entered value ($23,847) by more than 10 per cent, it is the opinion of this Department that no penal duties have accrued, and that

the entry should be liquidated, charging only the regular duties due. You will please be governed accordingly.

Respectfully, yours,

C. S. HAMLIN,
Assistant Secretary.

O

Supreme Court of the United States.

Nos. 225 and 236.—October Term, 1900.

The American Sugar Refining Company, Petitioner, *vs.* The United States.	On writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 20, 1901.]

Mr. Justice McKenna delivered the opinion of the Court.

These two cases were argued and submitted together. They involve the appraisement of certain sugars imported from Brazil. The sugars were shipped "green," that is, contained moisture. A certain per cent. of this moisture drained on the voyages, and the sugars became thereby more valuable. In other words, as the sugars diminished in weight they increased in value, being worth as much here as the original quantity shipped in Brazil. This is always true of Brazilian sugars, and is recognized by the trade and is made a basis of settlement between vendor and vendee. The "settlement test" was used by the appraisers in ascertaining the value of the sugars in Brazil in the condition they arrived here. Mr. Sharretts, a member of the general board of appraisers, testified in No. 236 (and there was no opposing testimony) as follows:

"The price paid for sugars of this description from Brazil is a conditional one, the stipulation being that they will give a certain price, with a proviso that the decrease or loss of weight in decreased moisture shall not exceed a certain point. Therefore, in determining what the real price to be paid for that sugar was, it was necessary to determine what the test was in the United States. By an agreement between the board of general appraisers and the government on the one side and the importers on the other, we accepted in all cases the settlement test as controlling; that is, the test upon which the commercial transaction was made was the test which we accepted as the controlling one in determining the quantity or percentage of sugar on which duty was to be paid. In this particular case the board found or the board made a return upon the settlement test. On that settlement test they made the report and found the value to be equal to 11s. 11d. per 100 kilos or per ton, the equivalent for this sugar of the same test as that which arrived in the United States, in the country of exportation. In other words, they held that the diminished quantity of sugar arriving in the United States was worth just as much as they paid for the original quantity as shipped from Brazil. We therefore found it on the basis of the settlement test to be 11s. 11d."

Duties were levied by the collector upon the increased valuation of the sugars. The importers protested, claiming that the duties were illegally exacted. The action of the collector was affirmed by the board of gen-

eral appraisers, and successively by the Circuit Court and the Circuit Court of Appeals. The cases were then brought here.

Under section 182½ of the tariff act of 1894 the rate of duty was fixed at forty per cent.; but upon what valuation? Counsel for petitioner says

"In each of these importations the appraiser ascertained that the market value of the sugar when shipped was a certain amount per hundredweight. To this valuation, in each case, he made an addition of a certain further amount per hundredweight to represent a supposed increase of its value during the voyage owing to drainage. Duty was accordingly assessed at forty per cent., not of the value of the sugar per hundredweight 'at the time of the exportation to the United States,' 'on the day of actual shipment,' and 'in the condition in which such merchandise is there bought and sold for exportation to the United States,' but at forty per cent. of its greater value per hundredweigh in its condition when landed."

It is apparent that the increase in value offsets the decrease in weight—that is, the total value of the invoice was not increased. Where then was there injury to petitioner? The claim is that duties should have been levied according to the condition in which the sugars had been bought in Brazil, but the claim ignores one element of that condition—the very element which made the condition—and ignoring it the claim is attempted to be justified by section 19 of the customs administrative act of 1890. The section provides as follows:

"That whenever imported merchandise is subject to ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market or wholesale price of such merchandise as bought and sold in usual wholesale quantities, at the time of exportation to the United States, in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale. . . . That the words 'value' or 'actual market value' whenever used in this act or in any law relating to the appraisement of imported merchandise shall be construed to mean the actual value or wholesale price as defined in this section."

We do not think the statute is very obscure. Passing by the consideration of section 23, (inserted in the margin,)* we may say, as was decided in *Marriott* v. *Brune*, (9 How. 619,) and *United States* v. *Southmayd*, (Id. 637,) imported merchandise is that which arrives in this country, and it is upon

*SEC. 23. "No allowance for damage to goods, wares and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon. But the importer thereof may, within ten days after the entry, abandon to the United States all or any portion of goods, wares and merchandise included in any invoice, and be relieved from the payment of the duties of the portion so abandoned, provided the portion so abandoned amounts to ten per centum or over of the total value or quantity of the invoice."

that duties are to be paid. Those cases passed on imports of sugars which had lost weight by drainage on the voyages. The controversy was whether duties should be levied upon the weight of the sugars when shipped, or upon their weight when they arrived, which was less on account of drainage and waste to the extent of five per cent., than when they were shipped. The court sustained the latter view, saying: "The general principle applicable to such a case would seem to be, that revenue should be collected only from the quantity or weight which arrives here. That is what is imported—for nothing is imported until it comes within the limits of the port." The evidence in those cases also showed that the quality of the sugars was less on account of the drainage. "Nor is his sugar improved in quality," the court said, "by the drainage, so as to raise any equity against him (the importer) by it."

The evidence in the case at bar is that the sugars had improved in quality—becoming a higher grade of sugar, and necessarily under the principle of the cited cases it was that grade which was imported. Why then should they not have paid duty according to that grade? It was that grade, to use the language of *Marriott* v. *Brune*, which went "into the consumption of the country"—it was that grade which went "into competition with our domestic manufactures."

But, it is contended, that was not their condition when shipped. In one sense it was not, nor did the importers seek to pay duty on the sugars in the condition in which they were shipped. An element of that condition escaped, and it was calculated that it would escape, and the price to the importer was to be adjusted by it. With no decrease in the value of its sugars, petitioner claims a decrease of duties which the law fixes by value. The petitioner wants the benefit of the weight of the old condition and the benefit of the quality of the new.

To dwell upon the relative conditions of the sugars is misleading. They are really not the same articles, and it is upon the imported article the duty must be laid. This is the purpose of the statute. It is "such merchandise" which is imported and which is subject to an ad valorem duty according to its market value from whence it has come. And the practical justness of the rule is illustrated by this case. It is true that a witness testifying generally as to drainage from sugar cargoes said "it (the drainage) might be worth more and it might not be worth much." But what it was worth in the present case was not testified to. Whatever it was worth, it was petitioner's property, and whether it was worth reclamation was for petitioner to judge. Besides the ultimate valuation of the appraisers is not contested. Their authority is to make it. As the Court of Appeals said, "the legality of the appraisement is questioned, not its accuracy or its equity." We have no doubt about its legality, and the

Judgments are affirmed.